Microcard Editions
An Indian Head Company
A Division of Information Handling Services

CARD 1

(23,102)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 213.

SIDNEY S. SCHUYLER, JOHN R. CHADWICK, AND CHARLES L. BURNHAM, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF SCHUYLER, CHADWICK & BURNHAM, APPELLANTS,

vs.

CHARLES E. LITTLEFIELD, AS TRUSTEE IN BANKRUPTCY OF A. O. BROWN & CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1913.

a United States Circuit Court of Appeals for the Second Circuit.

In the matter of A. O. BROWN & COMPANY, Bankrupts; CHARLES E. LITTLEFIELD, as Trustee, etc., Appellant.

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United States for the Southern District of New York.

United States Circuit Court of Appeals, Second Circuit, Filed Dec. 2, 1911. William Parkin, Clerk.

1 United States Circuit Court, Southern District of New York.

In the Matter of A. O. BROWN & Co., Bankrupts.

In re Claim of SCHUYLER, CHADWICK & BURNHAM, Creditor.

Statement.

January 8, 1909.	Order to Show Cause Granted.
January 11, 1909.	Answer of Charles E. Littlefield, Receiver, to above Order Filed.
February 2, 1909.	Hearing before J. J. Townsend, Special Master.
	Special Master's Report Filed.
	Memorandum, Hand, D. J., on Confirming Report.
April 20, 1911.	Order of District Court Confirming Special Master's Report, Filed.
July 10, 1911.	Citation Filed.
July 10, 1911.	Petition and Allowance of Appeal Filed.
July 10, 1911.	Assignments of Error Filed.

2 *Order to Show Cause.*

United States District Court, Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, SAMUEL C. Brown, Edward F. Buchanan, Lewis G. Young and W. Rhea Whitman, Individually and as Members of the Firm of A. O. Brown & Co., and the said Firm of A. O. Brown & Co., Bankrupts.

Upon the petition of Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, hereto annexed, and of all the papers filed in the above entitled proceeding, and upon all proceedings had herein, it is ordered that Charles E. Littlefield, the Receiver and Trustee of

above named bankrupts herein, show cause before this Court at a term thereof, to be held at the United States Court House, Post Office Building, in the City of New York, Borough of Manhattan, State of New York, on the 11th day of January, 1909, at the opening of Court on said day or as soon thereafter as counsel can be heard, why an order should not be made herein as prayed for in said petition, and why petitioners should not have such other and further relief as may be proper in the premises.

Service of a copy of this order and the petition upon which it is made upon said Charles E. Littlefield, Trustee as aforesaid, on or before the 8th day of January, 1909, shall be sufficient.

GEO. C. HOLT, *D. J.*

3 *Petition of Schuyler, Chadwick and Burnham.*

United States District Court, Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, SAMUEL C. Brown, Edward F. Buchanan, Lewis G. Young and W. Rhea Whitman, Individually and as Members of the Firm of A. O. Brown & Co., and the said Firm of A. O. Brown & Co., Bankrupts.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Sidney S. Schuyler, John R. Chadwick, and Charles L. Burnham, co-partners, trading under the firm name of Schuyler, Chadwick & Burnham, respectfully represents and shows:—

First. That at all the times hereinafter mentioned, your petitioners were and still are co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, and engaged in business at No. 100 Broadway, in the City of New York, as brokers in the stocks and other securities. That Sidney S. Schuyler, one of the members of said firm, is a member of the New York Stock
4 Exchange in the City of New York, and was at that time and is now Exchange member of said firm, that is to say, it is through his said membership that said firm has its connection with said New York Stock Exchange.

Second. That on and for some time prior to the 25th day of August, 1908, Albert O. Brown, G. Lee Stout, Samuel C. Brown, Edward F. Buchanan, Lewis G. Young and W. Rhea Whitman were co-partners trading under the firm name and style of A. O. Brown & Co., and conducted business at No. 30 Broad Street, in the City of New York, as brokers in stocks and other securities. The said Albert O. Brown and Lewis G. Young were members of the New York Stock Exchange in the City of New York and were known as the Exchange members of said firm, that is to say, it was through said memberships that the said firm of A. O. Brown & Co. had its connections with said New York Stock Exchange.

Third. That on or about the 25th day of August, 1908, the suspension of the business of said firm of A. O. Brown & Co. was announced on the New York Stock Exchange in the City of New York, and thereafter, to wit, on or about the 29th day of August, 1908, an application was filed in this Court by Frank V. Strauss and sundry other creditors, asking that Albert O. Brown, G. Lee Stout, Samuel C. Brown, Edward F. Buchanan, Lewis G. Young and W. Rhea Whitman, individually and as members of the firm of A. O. Brown & Company and the said firm of A. O. Brown & Co. be adjudged Bankrupts within the meaning and purview of the statutes of the United States pertaining to bankruptcy. Thereafter, to wit, on September 1st, 1908, Charles E. Littlefield was appointed by this Court, receiver of said firm, pending adjudication of the said parties as Bankrupts. That said Charles E. Littlefield duly qualified as such receiver and took over all the assets and property of said firm, especially the cash, credits, deposits and equities in stocks in the Hanover National Bank. Thereafter, to wit, on the 6th day of October, 1908, said individuals and said firm were duly adjudicated Bankrupts within the meaning and purview of said statutes.

Fourth. That thereafter, to wit on the 28th day of December, 1908, at a meeting of the creditors of said firm and of said individuals, held on said day Charles E. Littlefield was duly elected Trustee thereof, and has duly qualified as said Trustee, and all of the property and assets of said firm which were in the possession and control of said receiver have been turned over to and are now in the possession of said Trustee.

Fifth. That on the 24th day of August, 1905, one of the members of said A. O. Brown & Co., to-wit, Edward F. Buchanan, called upon your petitioners, and requested them to loan to said A. O. Brown & Co. a number of securities, among others of which were Three Hundred (300) shares of preferred stock of the Interborough Railway Company (a corporation organized under the laws of the State of New York in the City of New York, Borough of Manhattan, State of New York) at the market price of said stock on that day which was Thirty-two ($32) Dollars per share. That your petitioners at first declined to make said loan, but said Edward F. Buchanan thereupon stated and represented as an inducement for the making thereof that his said firm of A. O. Brown & Co. was absolutely solvent; that it had ample property and funds with which to pay all of its obligations in full; that it was in no danger of insolvency or bankruptcy, and that if said loan would be made, his said firm would pay the market price thereof on that day, and, for that purpose, would forthwith send to the petitioners the check of his said firm in payment thereof, and would return said stock to the petitioners at the market price at such time as the petitioners might demand the same, or at such time as said firm of A. O. Brown & Co. upon proper notice to the petitioners should indicate its intention to return said stock.

Sixth. That relying upon said representations, and believing them to be true, your petitioners agreed to make said loan, where-

upon your petitioners took from their private depository the Three hundred (300) shares of stock referred to and delivered the same to the said firm of A. O. Brown & Co., and secured from said firm its check on the Hanover National Bank for Ninety-six Hundred ($9,600) Dollars, dated on said 24th day of August, 1908, payable to the order of your petitioners.

A copy of said check appears as follows:—

[Printed on left margin:] "A. O. Brown & Co.

No. 38051. NEW YORK, *Aug.* 24, 1908.

The Hanover National Bank of the City of New York

Pay to the order of Schuyler, Chadwick & Burnham Ninety-six hundred $..... Dollars.

A. O. BROWN & CO.,

$9,600# By G. LEE STOUT."

Your petitioners pray to be allowed to refer to the original thereof upon this proceeding or any other proceeding herein, with the same force and effect as if the said original were hereto attached.

Your petitioners are now informed and believe that the representations made by said Edward F. Buchanan for and on behalf of his said firm, as to the property and solvency of said firm were false and untrue and were known to him to be so at the time he made the same and were made for the purpose of inducing your petitioners to loan said stocks and receive the check of said firm therefor.

7 Seventh. Your petitioners are informed and believe that the said firm of A. O. Brown & Co. intended, by the giving of said check, to appropriate so much of the money, funds or credits which they had in and with said Hanover National Bank, to the payment thereof, at the time said check was given, and at such time as it might be presented for payment, and your petitioners accepted said check with the like intent and purpose, and would not have received the same, nor loaned its said stock to said firm upon any other consideration or circumstances, whatsoever. That said check was received too late on the 24th day of August, 1908, to enable your petitioners to present the same for payment, or certification on the 24th day of August, 1908, but was presented at the Hanover National Bank, where it was made payable, for payment on the following morning, to-wit, on the 25th day of August, 1908, at 10 oclock in the forenoon of said day, but payment thereof was refused.

Eighth. Your petitioners are informed and believe that after the receipt of the stock hereinbefore referred to the said A. O. Brown & Co. delivered the same to the firm of Miller & Company in the City of New York, and received therefor its check for the said sum of Ninety-six hundred ($9,600) Dollars which the said firm of A. O. Brown & Co. deposited on said 24th day of August, 1908 to its credit in said Hanover National Bank. Upon information and belief your petitioners further aver that said check or the proceeds therefrom were in the said Hanover National Bank at the

time the check of A. O. Brown & Co. given to your petitioners was presented for payment and payment refused and at the time of the appointment of the receiver and trustee.

Ninth. Your petitioners are informed and believe that, for the purpose of paying said check, at the time of the presentation of the same, said firm of A. O. Brown & Co. borrowed from said
8 Hanover National Bank, and placed to its credit therein, the sum of Eighty thousand ($80,000) Dollars on the afternoon of August 24, 1908; that for like purpose on August 25th, 1908, it borrowed the further sum of Eight thousand ($8,000) Dollars; and that for like purpose it also turned over to said Hanover National Bank a number of securities, a schedule of which is hereto annexed, which, together with the equities that it had in other securities in said bank, and with the monies deposited and borrowed and placed to its credit as aforesaid, were intended should be used for the purpose of paying the check hereinbefore referred to.

Tenth. Your petitioners further allege that at the time the check of A. O. Brown & Co. for Ninety-six hundred ($9,600) Dollars given to your petitioners as aforesaid, was presented for payment; at the time of the appointment of the receiver herein, and at the time of the election of the trustee herein, there were sufficient funds, credits and assets of A. O. Brown & Co. in the Hanover National Bank to pay all persons holding checks of said A. O. Brown & Co., similarly situated to your petitioners, and that there is now in said bank arising out of the deposits and credits hereinbefore referred to of said A. O. Brown & Co. a sum in excess of Fifty thousand ($50,000) Dollars. They are informed and believe that said funds and credits are and constitute a trust fund for the payment of said check and that your petitioners are entitled to have an equitable lien established thereon, for the amount of said check with interest.

Eleventh. Your petitioners are informed and believe that they were and are entitled to have the said check for Ninety-six hundred ($9,600) Dollars paid to them out of the funds, assets and credits in said Bank, prior to the payment of said fund to any creditor or creditors of said A. O. Brown & Co.

9 Wherefore and by reason of all of which, your petitioners pray this Honorable Court:—

1st. To ascertain and determine their rights in the premises.

2nd. That it will determine that the funds and credits in the hands of the Hanover National Bank constitute a trust fund out of which the check hereinbefore referred to should be paid, prior to the payment of any claims of creditors.

3rd. That it will determine that your petitioners are entitled to an equitable lien upon said funds for the payment of said check as aforesaid.

4th. That the Trustee herein be directed to pay to your petitioners such sum as this Honorable Court may determine to be due and payable to them under the facts and circumstances herein set forth.

5th. That they may have such other and further relief as may be proper in the premises.

And your petitioners will ever pray.

SIDNEY S. SCHUYLER,
JOHN R. CHADWICK,
CHARLES L. BURNHAM,
Petitioners.

W. BENTON CRISP,
Attorney for Petitioners.

Office and P. O. Address, 20 Broad St., Manhattan, New York City, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Charles L. Burnham, being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition; that he knows the contents thereof, and that the same are true to his own knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters he believes them to be true.

CHARLES L. BURNHAM.

Sworn to before me this 5th day of January, 1909.

[SEAL.] MILTON G. BUCKY,
Notary Public, Kings County, N. Y.

Certificate filed in N. Y. Co.

A. O. Brown & Co.

Schedule of Securities With Hanover National Bank.

(Aug. 24th.)

200 Rep. Steel.
15 Amer. Lr.
10 H. & Lr.
5 Chicle.
200 Am. Brake Stove.
5 B. Gas.
1 Cent. Lr. Pfd.
5 Rock Is.
5 Wabash.
5 Wheeling L. E. 1st.
20 Int. Marine Pfd.
30 Copper.
10 Nor. Sec. Stubs.
295 Nev. Utah Cop.
1440 Nipissing.
13 Newhouse.
550 Greene Cananea.
490 Cumb. Ely.
200 Chic. Subway.

100 Con. Ariz.
200 But. Col. Copper.
50 Pa.
5 No. Pac.
5 Atch.
5 Steel.

(Endorsed:) Petition and order to show cause filed January 8, 1909.

11 United States District Court, Southern District of New York.

In the Matter of ALBERT O. BROWN, G. LEE STOUT, SAMUEL C. Brown, Edward F. Buchanan, Lewis G. Young, and W. Rhea Whitman, Individually and as Members of the Firm of A. O. Brown & Co., and the said Firm of A. O. Brown & Co., Bankrupts.

On the Petition of Sidney S. Schuyler, John R. Chadwick, and Charles L. Burnham.

Charles E. Littlefield, Receiver of the above named bankrupts, answering the petition of Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, respectfully shows to this Court and alleges:

I. The respondent herein denies any knowledge or information sufficient to form a belief as to the allegations set forth in paragraphs of said petition marked "First," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth" and "Eleventh."

Wherefore your respondent prays that the petition herein
12 may be dismissed.

HAYS, HERSHFIELD & WOLF,
Attorneys for Receiver.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, City of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Littlefield being duly sworn, says, that he is the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

CHARLES E. LITTLEFIELD.

Sworn to before me this 11th day of January, 1909.
[SEAL.] ADELE F. SHAW,
Notary Public, Kings Co.

Certificate filed in New York Co.

(Endorsed:) Answer filed Jany. 11, 1909.

13 *Report of Referee as Special Master on Claims of Schuyler, Chadwick & Burnham and First National Bank of Princeton, Illinois.*

United States District Court, Southern District of New York.

No. 11277.

In the Matter of A. O. BROWN & COMPANY, Bankrupts.

In the Matter of the Claims Against the So-called HANOVER NATIONAL BANK FUND.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Trustee has in his possession, as received by the Receiver or by himself from the Hanover National Bank, a fund consisting of cash and securities (or the proceeds of the latter), as follows:

$2,055.97 paid to the Receiver September 5, 1908, in closing out the so-called deposit or checking account;

53,597.66 paid to the Receiver September 5, 1908, being the surplus proceeds of collateral sold by the Hanover National Bank after payment of the principal and interest of four loans known as Nos. 1519, 1530, 1546, and 1553.

14 Collateral returned as follows, intact:

100 shares of Southern Pacific, or transfer receipt, being the collateral to secure loan No. 1553, infra, p. 11.

The following securities pledged to secure loan No. — for from $25,000. to $30,000., which I am informed by the Trustee have been disposed of by him, or are on hand, as follows:

Securities.	Disposition.	
200 Rep. Steel	Del'd to Boody, McLellan & Co., by Court Order.	
15 Ice Secs	Del'd to Jno. Wallace & Co., by Court Order.	
10 Hide & L	Del'd to Wm. H. Doherty, by Court Order.	
5 Amer. Chicle	Del'd to Addison H. Westcott, by Court Order.	
200 Am. Brake Shoe	Sold April 6, 1909, net	$11,295.25
5 Brooklyn Un. Gas	Del'd to Sarah L. Cooper, by Court Order.	
1 Cent. Lthr. Pf	Sold June 9, 1909	104.85
5 Rock Isl	Sold April 14, 1910, net	240.53
5 Wabash	Del'd to Louise M. Contencin, by Court Order,	
5 W. & L. E. 1st Pf	Sold May 17, 1909, net	55.35
20 Int. M. Mar. Pf	Sold April 19, 1909, net	500.00

30 United Copper	Del'd to Chas. D. Mosher, by Court Order.	
10 No. Sec.	Del'd to Minnie E. Young, by Court Order.	
295 Nev. Utah	Sold 180 shs. May 5, 1909, net	425.34
	Sold 5 shs. April 14, 1910, net	4.07
	110 shs.	On hand
1440 Nipissing	Sold 400 shs. April 30/09, net	4,042.00
	Sold 400 shs. May 4, 1909, net	3,992.00
	Sold 440 shs. May 6, 1909, net	4,390.05
	Sold 200 shs. May 6, 1909, net	1,996.00
13 Newhouse	Sold May 10, 1909, net	42.21
550 Greene Cananea	Del'd 50 shs. to J. W. Skinkle, by Court Order.	
	Del'd 200 shs. to Frank W. Banckes, by Court Order.	
	Sold 45 shs. May 5, 1909, net	448.92
	255 shs.	On hand
490 Cumb. Ely	Sold 100 shs. May 10, 1909 Sold 200 shs. May 10, 1909 } net Sold 90 shs. May 12, 1909	2,499.25
	Sold 100 shs. April 20, 1910, net	237.50
200 Chic. Sub.	Sold 100 shs. May 5, 1909, net	2,410.50
	100 shs.	On hand
100 Cons, Ariz. Sm. & Ref.		On hand
200 Brit. Col. Cop.	Sold May 7, 1909, net	1,177.25
50 Penn.	Sold May 5, 1909, net	3,393.24
5 No. Pac.		On hand
5 Atchison	Del'd to Harold S. Hyman, by Court Order.	
5 Steel		On hand

15 The cash fund above mentioned has been decreased as follows: $17,695.95 paid to Morison Brothers, October 27, 1909, by Court order.

To recapitulate the above, the fund at date may be stated as follows, exclusive of interest:

Cash from the checking account	$2,055.97
Cash received by the Receiver, being surplus proceeds of collateral sold by the Hanover National Bank	53,597.66
	$55,653.63
Less amount paid to Morison Brothers	17,695.95
	$37,957.68
To the above must be added the proceeds on hand of the sale of securities, as above	37,254.31
	$75,211.99

Securities still on hand:

110 shs. Nevada Utah.
255 shs. Green Cananea.
100 shs. Chicago Subway.
100 Cons. Ariz. Sm. & Ref.
5 No. Pacific.
5 Steel.

Against this mixed fund, consisting of cash and securities now in the possession of the Trustee, claims are made as follows:

Claim of Schuyler, Chadwick & Burnham; Represented by W. Benton Crisp, Attorney, 20 Broad Street, New York City.

The claim or petition in reclamation, which is for the proceeds of 300 shares of the preferred stock of the Interborough Railway Company alleged to have been obtained by A. O. Brown & Co.
16 on false representations and to have been converted, was filed in the office of the Clerk January 11, 1909.

The following witnesses have been examined before me:

Charles L. Burnham, formerly assistant secretary of the New York Stock Exchange and now a member of the claimant firm of Schuyler, Chadwick & Burnham, stock brokers, doing business on that Exchange; Walter B. Tuthill, the claimants' bookkeeper; Felix T. Heymann, the cashier of Miller & Co., to whom the Preferred stock of the Interborough Railway Co., Certificates Nos. 8386, 8387, 8245, each for 100 shares, borrowed by A. O. Brown & Co. from the claimant firm, was delivered by A. O. Brown & Co.; and Alfred Tobias, the claimant firm's ticket clerk and comparison clerk.

About noon of Tuesday, August 25, 1908, the bankrupts A. O. Brown & Co. executed a general assignment for the benefit of creditors.

In substance, the claimant Burnham testified that at about noon of Monday, August 24th, 1908, Buchanan, one of the bankrupts, by telephone applied to him for a loan of certain stocks, specifying particularly the Preferred stock of the Interborough Railway. That upon his hesitating, as he explained because of the somewhat "spectacular" transactions, as he termed them, of A. O. Brown & Co. on the preceding Saturday, Buchanan invited him to come over to see him in his private office. Burnham narrates (p. 5) what was then said to him by Buchanan. This conversation should be read in extenso. In substance, it was to the effect that there was nothing in any rumors that the firm of A. O. Brown & Co. were insolvent or embarrassed, that they had ample funds, but experienced difficulty in getting stock presumably for their deliveries. As a result of the interview, Burnham agreed to loan 300 shares of the Preferred stock of the Interborough Railway Co. In accordance with the custom of the New York Stock Exchange, the lender of the stock
17 should receive from the borrower a check for the value of the stock susceptible of certification. The testimony of Burnham is further to the effect that though repeated demands were made by his firm for such a check, no check was actually received Monday afternoon until about four o'clock, when too late for certification. The check then received (Claimants' Exhibit 1), was drawn on the Hanover National Bank by A. O. Brown & Co. in favor of Schuyler, Chadwick & Burnham for $9,600. signed by A. O. Brown & Co. by G. Lee Stout, one of the partners. Burnham further states that the Hanover National Bank refused either to certify or pay this check

though presented several times to the Hanover National Bank on Tuesday morning, August 25th, before and after 10 a. m.

Tuthill, the bookkeeper of the claimant firm, explains the custom of the Stock Exchange as to the loan of stock such as was requested and made in this case, testifies as to the preparation for delivery of the certificates Nos. 8386, 8387, 8245, each for 100 shares, and to the non-receipt of the check of A. O. Brown & Co. until about 4 p. m. of Monday afternoon, when too late for certification, although before that time repeated attempts had been made to get the check. He also testifies that he sent a messenger with the check to the Hanover National Bank several times both before and after 10 a. m. Tuesday, August 25th.

Tobias, the ticket clerk and comparison clerk for the claimant firm, testifies that in addition to the ordinary messenger of his firm, he himself on Tuesday morning went to the Hanover National Bank to procure the certification or payment of the check, and was met with the reply "No funds." He also states that he saw the cashier of A. O. Brown & Co. regarding the check and was told to take it to the Hanover National Bank, but states he was unable to see any of the partners of the firm of A. O. Brown & Co.

18 Heymann testifies that he was the assistant cashier for Miller & Co., which firm on August 24th received from A. O. Brown & Co. according to directions given to the latter firm by the Clearing House of the New York Stock Exchange, the identical certificates for 300 shares of the Preferred stock of the Interborough Railway loaned by the claimant firm to A. O. Brown & Co. and delivered to the messenger of A. O. Brown & Co. on August 24th the check of Miller & Co. The check so delivered was for the amount of $266,600, and included $9,600, the value at $32 per share of the 300 shares before mentioned of the Preferred stock of the Interborough Railway Co.

The Trustee conceded the delivery by the claimant firm to A. O. Brown & Co. on Monday, August 24, 1908, of the borrowed stock. He also conceded that at the time and before the conversation between Burnham and Buchanan, the firm of A. O. Brown & Co. were insolvent.

The testimony thus far establishes, and I so find, a fraudulent conversion by A. O. Brown & Co. of the claimants' 300 shares of Interborough Railway preferred stock. It will be noted, the case is not one of securities of which possession was originally lawfully acquired, but one where the original possession was itself unlawful. The terms of the contract for the loan of the stock were the delivery by the borrower—immediately upon the delivery of the stock by the lender, or within the lapse of a sufficient time for the delivery of a check with usual expedition in the ordinary course of business—of a check for the value of the stock susceptible of immediate certification. In the transaction before me, the claimants delivered their securities on these terms and without any interest on their part to extend credit to A. O. Brown & Co. for any period of time during

which the idea of collateral security or claim for collateral
19 security was relinquished by the claimants.

The case does not differ from one of sale and delivery and is governed by the same principle in this regard: Adams v. Roscoe Lumber Co., 159 N. Y. 180; Empire State Type Foundry Co. v. Grant, 114 N. Y. 40.

The claimants' identical certificates for 300 shares of the preferred stock of the Interborough Railway were, with other securities, delivered by A. O. Brown & Co. late in the afternoon of August 24, 1908 to Miller & Co.

Miller & Co. gave to A. O. Brown & Co. two checks on that day, Monday the 24th, on the Phenix National Bank, for $226,600. and $23,000. The first check was deposited in the Hanover National Bank on Monday the 24th, before the close of business on that day (see Bank Statement Ex. 1, S. M. p. 40; and testimony of Carse, the cashier of the Hanover National Bank, S. M. p. 47; see also Stipulation filed with the Referee, May 29, 1909). The latter check was received on Monday too late for deposit in the Hanover National Bank until the next day, Tuesday the 25th (See Bank Statement and Heymann, S. M. p. 18.)

The evidence indicates that the delivery of the securities by the claimants to A. O. Brown & Co. took place well on in the afternoon of Monday the 24th (Burnham, S. M. p. 4; Tuthill, S. M. p. 10; and Heymann, S. M. p. 18).

I find as a matter of fact, as a reasonable inference from the foregoing, that the proceeds or value of the claimants' securities form part of the second check, or the check for $23,000, received too late for certification and deposit on the 24th, but deposited on the morning of the 25th.

By stipulation filed with the Referee May 24, 1909, the testimony and exhibits in the claim of Morison Brothers were received in the present claim so far as material to the issues of fact and law.

The testimony of Carse, the cashier of the Hanover Na-
20 tional Bank, given in the Morison case (S. M. pp. 50, 51, 52, 53), indicates, and I so find, that the deposit of A. H. Combs & Co.'s check for $66,600., mentioned hereafter, and the immediate certification of the check, mentioned hereafter, of A. O. Brown & Co. to the order of A. H. Combs & Co. for $146,600., was the first transaction on the morning of Tuesday the 25th, and preceded the deposit of Miller & Company's $23,000 check, and that the certification mentioned was made not on the faith of the $23,000. check, but upon the faith of A. H. Combs & Co's check and the firm's equity in the securities pledged as collateral for the loans which had been made or arranged over night or early on Tuesday morning. (See the testimony of Carse in the Morison case, pp. 85, 86, 87, 89, 90, 91; and of H. B. Combs in the Morison case, pp. 202, 203, 205.) Indeed it appears that without any collateral at all, on the preceding morning, the Bank had given A. O. Brown & Co. credit for $200,000, as appears by Carse's testimony in this case (S. M. p. 40).

As appears below (page 11) there were three such loans, to wit:

Loan No. 1546 for $250,000., Loan No. 1553 for $8,000, and Loan No. — of say $30,000.

The Bank statement before mentioned and the testimony of Carse at the present hearing (S. M., p. 46 et seq.), shows that the morning balance on the books of the Bank on Monday, August 24, 1908, in favor of A. O. Brown & Co. was $130,867.166, which with deposits during Monday of $3,743,526.20, including loans by the Bank of $200,000., $85,000., $80,000., and $50,000., and including the first check of Miller & Co. before referred to, making an aggregate of $3,874,393.36: against which, on the books of the Bank, there were charged on Monday the 24th, drafts by A. O. Brown & Co. at $3,868,213.19, leaving a credit balance at the close of business on Monday and at the opening of business on Tuesday, August 25th, of $6,180.17.

In the forenoon of Tuesday, August 25, 1908, according to the same witness and the same statement, there were deposits of
21 $145,187.07 (S. M., p. 49), inclusive of a loan by the Bank of $8,000., of the check of A. H. Combs & Co. for $66,600., before referred to, of the check of Miller & Co. for $23,000. before referred to, and of the check of Trippe & Co. for $17,300. (since successfully reclaimed by Morison Brothers as the proceeds of their securities under the Special Master's Report in that claim, dated April 28, 1909.

These deposits of the forenoon of Tuesday, August 25th, added to the opening balance of $66,180.17, make a total of $151,367.24.

The withdrawals, or drafts, against this sum consisted of one check for $146,600 certified as before mentioned, for A. H. Combs & Co. the first thing in the morning of August 25th, and sundry minor checks or charges.

The balance of the account on the statement was ultimately closed out by a check to the order of the Receiver at $2,055.97, on September 5, 1908, after the credit back to A. O. Brown & Co. on August 26, 1908 of $3,562.24, which, for some reason, had been applied on August 25th in reduction of a loan.

The Bank statement mentioned above is in the nature of an account subject to check or draft, the deposits appearing on the credit side, and the drafts, or withdrawals, on the debit side.

At this time and from time to time, the Bank made loans to A. O. Brown & Co. secured by collateral. In the ordinary course of business, these loans were entered on the credit side of the account mentioned. This is evident from an inspection of the Bank statement before referred to, Exhibit 1.

At the time of the failure, there were oustanding five such loans secured by collateral, as follows:

Loan No. 1519, for $80,000., made August 24, 1908, appearing on the credit side of the Statement as of that date.

Loan No. 1530, for $50,000., made August 24, 1908, appearing on the credit side of the statement as of that date.

22 Loan No. 1546, for $250,000., made August 24 or 25, 1908, and not appearing in the Statement mentioned.

Loan No. 1553, for $8,000., made August 25, 1908, and appearing on the credit side of the Statement as of that date.

A loan No. —, of from $25,000 to $30,000., arranged for over night August 24-25, so as to be available on the morning of Tuesday, August 25th, Carse-Morison testimony, S. M. pp. 56, 85-6), upon collateral specified on the loan slip and pledged with the Bank but not entered to the credit of the firm's deposit account before the general assignment was made Tuesday morning.

It is clear from the testimony of Carse at the present hearing (S. M. p. 45) and from his testimony in the Morison case (S. M. pp. 56, 86), that the two loans not appearing on the statement, although made, were not carried through the books as stated, owing to the failure of the firm on the same morning, putting an end to all further transactions with the firm.

These five loans were made under a written agreement between A. O. Brown & Co. and the Hanover National Bank (Exhibit 2 of February 24, 1910, S. M. p. 41), in effect allowing the Hanover National Bank to apply on any indebtedness however arising, the collateral pledged as security for loans.

These five loans a few days after the failure were closed out by the Bank, as follows:

Loan.	Entire collateral sold out.
$80,000	$96,646.50
50,000	68,002.50
250,000	276,948.66
8,000	Not sold
$388,000	$441,597.66

Collateral on three loans	$441,597.66
Face of four loans	388,000.00
Balance	$53,597.66

23 The collateral securing the fifth loan of $25,000 to $30,000 was returned by the Bank to the Receiver unresorted to, as also was the collateral securing the $8,000 loan.

The Bank also paid to the Receiver the surplus from the sales above noted $53,597.66, and at the same time paid to the Receiver the $2,055.97 appearing on the Bank statement as closing out the deposit account.

The foregoing seems to me to embrace all the testimony which may be regarded as material to any view which may be taken of this case.

I have found (supra, page 9), as a reasonable inference from the testimony, that the proceeds or value of the claimants' securities, to wit: $9,600, formed part of the second check for $23,000, received

by A. O. Brown & Co. on Monday afternoon, too late for certification and deposit on that day. I also found that the certification of the $146,600. check to the order of A. H. Combs & Co. preceded on Tuesday morning the deposit of the $23,000 check, and was not made on the faith of such check.

I found in the Morison Brothers' claim, in substance, that the check of Trippe & Co. for $17,300, representing the proceeds of Morison Brothers' converted securities, had been deposited by A. O. Brown & Co. in the Hanover National Bank subsequently to the certification of the $146,600 check in favor of A. H. Combs & Co., and that therefore the certification of that check was not made on the faith of the check of Trippe & Co.

I decided the Morison claim in favor of the claimants, partly on this particular circumstance enabling the proceeds of claimant's securities to be traced within Cavin v. Gleason, 105 N. Y. 256, and partly on the equitable principle that the Hanover National Bank having in its possession two funds equally available, to wit: the Bank balance and the collateral, should have had recourse first to
the collateral in which the Bank alone was interested, and
24 only secondarily to the Bank balance in which the other creditors were interested. The Bank, however, followed the reverse process for the sake of its own convenience.

It seems to me that the material facts in the present case and in the Morison Brothers' case do not materially differ, and that, as in the Morison case, I should grant an order in favor of the claimants out of the fund for $9,600, payable only after the priorities of the respective claimants to the fund shall have been finally determined; and without prejudice to any right that the claimants may otherwise have to prove as general creditors and to participate in any dividend already declared or hereafter to be declared.

NOVEMBER 16, 1910.

Post Scriptum:

Pending the filing of the above report on the claim of Schuyler, Chadwick & Burnham, counsel for the Trustee and Counsel for the claimants, have appeared before me, and it has been called to my attention, by the former, that a statement in the early part of my report, to the effect that the proceeds or value of the claimants' Preferred Stock of the Interborough Railway Co. was in the first of the two checks delivered by Miller & Co. to A. O. Brown & Co., viz: the check for $266,600, is in conflict with the finding by me, made subsequently in the report, that such proceeds may reasonably be inferred to be included in the second check, viz: the check for $23,000, delivered by Miller & Co. to A. O. Brown & Co. late in the afternoon of Monday, August 24th, and concededly deposited only on the morning of Tuesday, August 25, the first check for $266,600 having been concededly deposited in the account of A. O. Brown & Co. on Monday, August 24th.

The finding that the proceeds mentioned may reasonably
25 be inferred to be included in the $23,000 check—is my finding in the premises.

The statement called to my attention occurs in a summary of the testimony of the witness Heymann and the other witnesses (it may be remarked that Heymann does not specify the check containing the $9,600, and my summary is erroneous in that particular, S. M. p. 16), which was prepared a year or more ago and prior to my critical examination of the testimony embodied in the subsequent portion of my report, recently prepared, and dealing with my findings of fact and conclusions of law arrived at by me on the whole case.

At the same time as the Counsel for the Trustee called my attention to the foregoing, he argued before me that the testimony does not warrant the inference drawn by me but is equally consistent with the presence of the $9,600 in either of the two checks—if not indeed more consistent with its presence in the earlier check—and accordingly, he further argued, the claimants had failed to establish an essential fact in their case in respect to which they were charged with the burden of proof.

The reverse proposition was argued before me by the Counsel for the claimants, in repetition of the argument originally made in his filed brief.

The contention of the Trustee's Counsel is that the oral testimony of the witness is inconclusive on the point, except that, as explained by Heymann, Miller & Co.'s cashier, two checks were given at an interval, viz: first a check for $266,600 and later a check for $23,000 (S. M. p. 18), and that the figures of the transaction between Miller & Co. and A. O. Brown & Co. point to the inclusion of the $9,600 in the first or larger check, the last three figures of that check being "600". In other words, his contention is that there were three items of securities delivered to Miller & Co. by A. O. Brown & Co.—
including the 300 shares of Interborough Preferred obtained
26 by A. O. Brown & Co. from the claimants—and nothing in
the oral testimony to show at what different times, if any, the three items were delivered by A. O. Brown & Co. to Miller & Co. on Monday, August 24th, or to warrant the application of either of the two checks to any particular one or more of the three items, except so far as the final "600" of the larger check may be significant.

The three items delivered by A. O. Brown & Co. to Miller & Co., were:

1000 shs. Northern Pacific	$143,000.
1000 shs. Great Northern Pref'd	137,000.
300 shs. Interborough Pref'd	9,600.
	$289,600.

The two checks received by A. O. Brown & Co. from Miller & Co., were:

No. 14908	$266,600.
No. 17654	23,000.
	$289,600.

(S. M., pp. 17, 18.)

Accordingly, the Trustee's contention is that my finding before referred to is not warranted.

For greater convenience in disposing of this issue, I will restate the grounds upon which my inference or finding is based.

There were three items of securities delivered by A. O. Brown & Co. to Miller & Co. on Monday, the 24th, of which only one item—the Interborough Preferred—was obtained by A. O. Brown & Co. from the claimants.

The obligation of A. O. Brown & Co. to deliver to Miller & Co. the three items (including the 300 Interborough Preferred at $9,600) arose under a direction of The Stock Exchange Clearing House and was therefore fixed and known to the parties at all times on
27 Monday at the figures of $289,600, figures which did not depend on how far delivery should actually be made. That A. O. Brown & Co. by reason of their embarrassed situation, experienced delay and difficulty in making delivery, particularly in respect to the item of 300 shares of Interborough Preferred, will be seen later and is corroborated (without mention of any particular stock) by the testimony of Heymann, Miller & Co.'s cashier.

Such delay accounts for the actual giving of two checks, at an interval, by Miller & Co. (S. M. p. 16). The fact that the figures, viz: $289,600, of the obligation to deliver were fixed and known prior to any delivery, greatly weakens any inference that the first check given, because of its final "600", indicates, as contended by the Trustee, the delivery of the claimants' Interborough Preferred, i. e., $9,600, prior to the making out of the check, or the inclusion of the $9,600 in the check: the $23,000 is quite as probably an arbitrary sum withheld to ensure entire delivery by A. O. Brown & Co. of the three items known to aggregate the figures $289,600. Furthermore, no combination of $9,600 with the figures of any one of the other two items yields any more probable explanation of why the figures of the first check were $266,600 than the reason suggested: viz: delay in the delivery of the $9,600 item and possibly some portion of one of the other items.

The testimony of Burnham shows (S. M. pp. 4, 5) that such difficulty and considerable delay was encountered by A. O. Brown & Co. in connection with obtaining the 300 shares of Interborough Pfd. which Buchanan (of A. O. Brown & Co.) finally succeeded in obtaining, after some hesitation on Burnham's part, from the witness' firm and which was delivered to A. O. Brown & Co. after the return of witness to his own office.

That this delivery was late in the business day is also indicated by the Claimants' Delivery Sheets (Schuyler Exhibit 2), the item being the last item of the day's deliveries.

28 The time necessary for the delivery to A. O. Brown & Co. and for the subsequent delivery by A. O. Brown & Co. to Miller & Co. of the Interborough Pfd. thus obtained from the claimants, also implies further delay, placing the delivery of this stock to Miller & Co. at a time later than the deliveries upon which

the $266,600 check was given by Miller & Co. to A. O. Brown & Co. and which was deposited by the latter in their Bank. It is also to be noted in this connection that Miller & Co.'s $23,000 check was not deposited by A. O. Brown & Co. at all on Monday, a deposit which A. O. Brown & Co. had every inducement to make if the check had been received in time, whereas Miller & Co.'s $266,600 check was deposited by A. O. Brown & Co. on that day. In other words, the $266,600 check was received by A. O. Brown & Co. early enough for deposit and the other check was not, probably because of the delay caused, as explained, by their difficulty in obtaining the 300 Interborough Pfd. There is nothing to show A. O. Brown & Co. had any difficulty in obtaining the two other items of stock to be delivered or that there was any delay in their delivery. These circumstances point to the delayed check for $23,000 contained in the proceeds or value of the item of securities in the obtaining and delivery of which there was obvious delay, viz: claimants' 300 shares of Interborough Preferred stock.

The testimony of Tuthill—the claimants' bookkeeper—(S. M. pp. 10, 13) does not militate against the above conclusion as his recollection of time of delivery is evidently merely opinion based on usual course of business only.

The testimony of Heymann—Miller & Co.'s cashier—as has been said, is to the effect of delay in delivery of an unspecified part of the stock (S. M. p. 14) and this delay, I repeat, may be reasonably attributed to the delivery of the Interborough Pfd. obtained
29 with so much difficulty from Burnham and after manifest hesitation on his part as mentioned.

The testimony of Tobias—the claimants' clerk—(S. M. p. 19) so far as of any value, is also possibly some indication that the delay was in respect to the Interborough Pfd.: i. e. A. O. Brown & Co. delayed giving the claimants their check for its value or $9,600, possibly because of their own delay in their own transaction as to this stock with Miller & Co.

The foregoing is my analysis of the testimony bearing on this branch of the case. The testimony, however, is in small compass and can readily be read in extenso.

While it is no doubt true that the burden of proof in the first instance rests upon the claimants, the circumstances under which they were deprived of their property create an exceptional equity in their favor which should relieve them from any heavier burden of proof than is necessary for the proper protection of the general estate from unlawful claims of this character. The circumstances under which the claimants were deprived of their property develope no equity in favor of the general creditors. The claimants neither voluntarily left their securities in the possession of A. O. Brown & Co., nor imposed in them any trust or credit, but simply parted with their property on cash terms which were never complied with and accordingly conferred no title to the stock.

Claim of the First National Bank of Princeton, Illinois, Represented by Thorndike Saunders, Attorney, 27 William Street, New York City.

This claim in reclamation was originally filed in the office of the Clerk, December 14, 1908.

My first Report on the claim as Special Master was filed in the office of the Clerk, May 28, 1909.

30 The claim is before me for a rehearing, pursuant to the decision of the Circuit Court of Appeals In re A. O. Brown & Co. ex parte The First National Bank of Princeton, Illinois, 23 A. B. R. 423. In that decision, the Court, in substance, held that the purchase-price of the stocks paid by the claimant could not be reclaimed, but that the claimant could follow the proceeds of its converted securities (p. 426).

Accordingly, at the present hearing, the petition in reclamation was amended (S. M. p. 21), so as to allege that the bankrupts' estate or some part of it, to wit: the moneys on deposit in the Bank to the credit of the said bankrupts, including proceeds of claimant's 20 shares of Atchison common and 25 shares of Missouri Pacific, and other properties, have come into the possession of the Receiver herein.

The claimant offered in evidence the printed record on its petition to review, with the exception of the clause at folio 41, beginning "It is conceded."

From this record and the testimony taken at the present hearing the following facts appear:

On August 13, 1908, A. O. Brown & Co. purchased for the claimant Bank 20 shares of Atchison common at 89¼ having received on August 12, 1908 the claimant's check for $1,787.50 deposited in the account of A. O. Brown & Co. in the Commercial National Bank of Chicago.

On August 18, 1908, A. O. Brown & Co. purchased for the claimant 25 shares of Missouri Pacific at 56 or $1,403.13, having received the day before the check of the claimant Bank for $1,403.13 deposited in the account of A. O. Brown & Co. in the Commercial National Bank of Chicago.

On the purchase of 20 shares of Atchison common, the firm received Certificate X-171502 for 10 shares and Certificate X-171342 for 10 shares.

Certificate No. X-171502 was delivered by the firm on August 13, 1908 to Carlisle, Mellick & Co., a firm of stock brokers in this City, and the latter's check to the order of A. O. Brown & Co. for

31 $857.50 was deposited in the Hanover National Bank in this City against "stocks borrowed" account.

Certificate No. X-171342 was on August 13, 1908 delivered to De Coppet & Doremus, a firm of stock brokers in this City, against "stocks borrowed" account, and A. O. Brown & Co. received the latter firm's check for $900: which check was deposited on the same day August 13, 1908 in the Hanover National Bank.

These facts appear in the report of Suffern & Son, certified public

accountants, made to Mr. Thorndike Saunders, attorney for the claimant Bank on March 16, 1910, to be found in extenso at Minutes p. 23. I take this transaction to be, differently stated, the same as that described at folio 32 of the printed record in the Receiver's letter to the claimant Bank dated October 24, 1908, or page 4 of the Minutes attached to my Report filed May 28, 1909.

The 25 shares of Missouri Pacific purchased for the claimant Bank appear by Messrs. Suffern & Son's report to have been purchased on August 17, 1908 from De Coppet & Doremus, stock brokers "on a balance" including this and additional purchases made through De Coppet & Doremus and delivered to A. O. Brown & Co., viz: 60 shares, represented by the certificates following: A-36951 for 20 shares, A-45326 for 20 shares, B-21012 for 10 shares, and B-20940 for 10 shares.

On the same day, August 17, 1908, A. O. Brown & Co. delivered Certificate A-36951 for 20 shares to De Coppet & Doremus, against "stocks borrowed" account in order to close a sale made to De Coppet & Doremus on August 17, 1908 of 10 shares for the account of one Webster and 10 shares for the account of one Wright & Co. A. O. Brown & Co. received the check of De Coppet & Doremus for $1,120, in return, deposited August 17, 1908 in their account in the National Bank of Commerce of this City.

The three remaining Missouri Pacific certificates, for 40
32 shares in the aggregate, in which were claimant's remaining
5 shares, on Monday, August 24, 1908, the day before the general assignment, were delivered by the first to De Coppet & Doremus against a sale on that date made for the No. 24 account or one Payne. In return A. O. Brown & Co. received De Coppet & Doremus' check "on balance" for $49,290.56, which was deposited in the Hanover National Bank of this City. At 56 this check would include $280. proceeds of claimant's 5 shares.

In the Hanover National Bank there was thus deposited as follows:

August 13, 1908 } 20 shs.	$857.50
August 13, 1908 } Atchison	900.—
	$1,757.50
August 24, 1908 included in a check for $49,290.56 proceeds of 5 Missouri Pacific @ 56	280.—
	$2,037.50

In the National Bank of Commerce, New York City, there was thus deposited:

August 17, 1908, 20 shs. M. O. Pacific @ 56	$1,120.—
Aggregate claim	$3,157.50

The opening and closing balances in the Hanover National Bank on and after August 13th, were largely in excess of the deposits specified. The particulars appear in Exhibit 10 of March 18, 1910

(S. M. p. 25), being account G. B. with the Hanover National Bank in a book lettered "Bank No. 3, A. O. B. & Co." Appendix I, page 66.

The testimony of Carse, an officer of the Hanover National Bank, taken in the claim of Schuyler, Chadwick & Burnham (Ex-
33 hibit 31 of April 7, 1910, in this claim, S. M. p. 46), is to the effect that the morning balance, on the books of the Bank, on Monday, August 24, 1908 was $140,867.16, which with deposits during the day of $3,743,526.20, made an aggregate of $3,874,-393.36, against which, on the books of the Bank, there were charged on the 24th drafts at $3,868,213.19, leaving a balance at the close of business on Monday and at the opening of business on Tuesday, August 25, of $6,180.17.

According to the same witness, on the books of the Bank, on Tuesday, August 25, 1908, inclusive of a $8,000. loan, there were deposits made of $145,187.07, which added to the balance of $6,-180.17 made a total of $151,367.24. The withdrawals were one check for $146,600, certified in the forenoon of August 25th, and sundry minor checks or charges.

The account was ultimately closed out by check to the order of the Receiver at $2,055.97 on September 5, 1908, after the credit back to A. O. Brown & Co. on August 26th of $3,562.24 applied on August 25th in reduction of loan, as appears on both sides of the account (Bank Exhibit 22, March 31, 1910).

The book lettered "Bank No. 3 A. O. B. & Co." sheet account G. A. (Bank Exhibit 33, S. M. p. 52), shows the morning and afternoon balances of A. O. Brown & Co. in the National Bank of Commerce of New York from the close of business August 17, to and including the opening of business on Monday, August 24, when the balance was $21,988.36. These balances were always largely in excess of the deposit of $1,120. mentioned as made August 17.

According to the extract from the books of the National Bank of Commerce, (Bank Exhibit 28 of March 31, 1910), the balance at the opening of business on August 24, 1908 was $25,837.97, and at the close of business August 24, 1908 $20,993.57. The extract shows the deposit on August 25 of one check for $86.40, which with the morning balance of August 24 makes $21,079.97, against which on August 25 five checks were charged, inclusive of one for $10,000. and one for $4,000., and the charge back of a check for
34 $5,800., drawn on the Hanover National Bank, deposited in the National Bank of Commerce on the 24th, but not paid. After these charges and other subsequent small charges, at the close of business August 29th there was a debit balance of $2,506.55 against A. O. Brown & Co.

Bank Exhibit 29, April 7, 1910, (S. M. p. 45)—Suffern & Son's report dated April 6, 1910, pages 6-7—shows that the check for $10,000. on the National Bank of Commerce was drawn to the order of A. H. Combs & Co. and that the check for $4,000. on that Bank was drawn to the order of the Hanover National Bank, and deposited in the latter Bank in A. O. Brown & Co.'s account: see also the deposit of the $4,000. check on August 25th, appearing in the Han-

over National Bank Statement (Exhibit 22, March 31, 1910). It is this $4,000. check which the claimant contends brings into the Hanover National Bank the claimant's money deposited in the National Bank of Commerce on August 17.

Exhibit 12, March 18, 1910, being the Trustee's petition to compromise his claim against A. H. Combs & Co., quoted at length at S. M. p. 26, shows that this $10,000. check was delivered in part payment of a balance of $146,600. due to A. H. Combs & Co. on a sale by them to A. O. Brown & Co. on August 24th, of 4300 shares of Reading, A. H. Combs & Co. at or about the same time securing a further cash payment from the account of A. O. Brown & Co. with the Hanover National Bank of $146,600, which they obtained by depositing their own check for $66,600. on the National Bank of Commerce. At or before this time, A. O. Brown & Co. also pledged certain securities with A. H. Combs & Co.

This transaction is further explained by the testimony of A. H. Combs & Co. (pp. 177-179) and of his son H. B. Combs (pp. 194, 197, 203-207), taken at the first meeting of creditors and here received as Exhibit 24, March 31, 1910.

Exhibit 25, March 31, 1910 (S. M. p. 42) identical with
35 Exhibit 12, March 18, 1910 (supra), shows that in his compromise the Trustee received from A. H. Combs & Co. a cash fund of $33,742.27 and the balance of the pledged securities, so far as not sold by A. H. Combs & Co.

The proof also establishes that on August 24th, A. O. Brown & Co. bought from A. H. Combs & Co., 4300 shares of Reading at $124, or $266,600., being the shares paid for in part by A. O. Brown & Co., as stated supra.

The loose leaf book "To Deliver", sheet of August 24, (Exhibit 13 of March 18, 1910, S. M. pp. 27, 34), and a letter from Newborg & Co., dated March 22, 1910) Exhibit 19, March 24, 1910, S. M. p. 34) establish that A. O. Brown & Co. delivered to Newborg & Co. 4300 shares of Reading in specified certificates on August 24 against a payment of $266,600. which from Exhibit 22, March 31, 1910—the statement of the Hanover National Bank—was deposited in that Bank August 24, 1908.

This last mentioned Exhibit shows that checks aggregating $3,868,213.19 were charged on August 24 against A. O. Brown & Co. as paid on that day. A comparison of this Exhibit with the report of Suffern & Son, dated April 6, 1910 (Exhibit 29 of April 7, 1910, S. M. p. 46), makes it reasonably certain that these checks were for stocks delivered on that day to A. O. Brown & Co. The Trustee concedes (S. M., p. 34) that a great number of shares were purchased on that day.

The Hanover National Bank statement (Exhibit 22, of March 31, 1910) shows deposits on Monday, August 24, 1908, inclusive of loans made by the Bank, of $3,743,526.20.

The balance in Bank at the opening Tuesday, August 25, was, as stated, $6,180.17, supra, page 18.

The balance at the opening Monday, August 24, was, as stated, $130,867.16, supra, page 18.

The five loan slips (Exhibits 23, *a*, *b*, *c*, *d*, *e* of March 31, 1910, S. M. p 39), show the following loans made by the Hanover
36 National Bank to A. O. Brown & Co.:

On August 24, 1908, a loan No. 1519 of $80,000. secured by 500 Great Northern preferred, 200 N. Y. Central, and 100 Copper. These securities were sold by the Bank on August 27, 1908, and a balance of $16,646.50 paid to the Receiver September 5, 1908.

On August 24, 1908, a loan No. 1530 of $50,000. secured by 500 Great Northern preferred. These securities were sold by the Bank on August 27, 1908, and a balance of $18,002.50 paid by check to the Receiver, September 5, 1908.

On August 25, 1908, a loan No. 1546 of $250,000., secured by 1000 Steel and 3000 Copper. These securities were sold by the Bank on August 27, 1908, and a balance of $26,948.66 paid by check to the Receiver. This loan does not appear in the Bank statement, Exhibit 22 of March 31, 1910.

On August 25, 1908, a loan No. 1553 of $8000., secured by 100 Southern Pacific. This security was not sold by the Bank but delivered to the Receiver, the loan being met as below. This loan appears in the Bank statement, Exhibit 22.

Another loan No. — of between $25,000. to $30,000. was arranged for on August 25, 1908, upon a variety of collateral actually delivered to the Bank. The loan never passed through the books of the Bank and does not appear therefore among the deposits of August 25th in the Bank statement, Exhibit 22. The failure intervening, the collateral was returned untouched to the Receiver, September 5, 1908.

The four loans first mentioned aggregated $388,000. As stated, the collateral pledged to secure three of the four loans was sold by the Bank, realizing a surplus above the three loans of $67,597.66. The Bank deducted from the latter sum the amount of the fourth loan, or $8,000., and turned over to the Receiver net $53,-
37 597.66, together with the collateral pledged to secure the $8,000. loan and the fifth loan, it not having been resorted to: see supra, page 1.

These loans were all made under a written agreement (Bank Exhibit 21 of March 31, 1910, S. M. p. 38), between A. O. Brown & Co. and the Hanover National Bank, in effect allowing the Hanover National Bank to apply on any indebtedness however arising, the collateral pledged as security for loans.

Finally, the testimony discloses no authority given by the claimant to A. O. Brown & Co. to sell or pledge the securities purchased for the claimant and paid for in full by the claimant.

The foregoing seems to me to embrace all the testimony which may be regarded as material to any view of the case. My purpose in stating it is to facilitate a final determination of the claim either by the Judge called upon to pass on my report, or by the Circuit Court of Appeals, in case of any appeal by any party in interest.

I also state, as a precaution, that the foregoing is not intended to

preclude any party in interest, on the coming in of this report, to make reference to the record of the testimony for any purpose.

The claimant invokes the equitable doctrine that as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and that if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his:

National Bank vs. Insurance Co., 104 U. S. 54, pp. 67 et seq. See also, Peters v. Bain, 133 U. S. 670 p. 693, where it is held that confusion does not destroy the equity entirely but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of th possessor.

38 Reference is also made to

Frelinghuysen v. Nugent, 36 Fed. Rep. 229, at p. 239, approved in Peters v. Bain, supra, p. 693.
In re Marsh, 8 A. B. R. 576, 586, 588.
In re Erie Railroad Co. v. Dial, 15 A. B. R. 559.
In re Royea, 16 A. B. R. 141, at bottom of p. 143.
Smith v. Motley, 17 A. B. R. 863, pp. 866, 867.
In re Brunsing Tolle & Postel, 22 A. B. R. 129.
Boone Co. Nat'l Bank v. Latimer, 67 Fed. Rep. 27.
In re A. O. Brown & Co., 24 A. B. R. 423, p. 426.
American Can Co. v. Williams, 178 Fed. Rep. 420, 423–4.
In re Stewart 178 Fed. Rep. 463, pp. 470, 1, 5–77.

These cases sufficiently establish the rule stated.

The difficulty obviously is in the application of the rule, and in determining whether the particular facts in each case bring it within the operation of the rule.

The contention of the claimant is, in substance, that the testimony or data outlined above warrants the following findings of fact:

That the proceeds of the sale of the claimant's certificates have been traced as deposited in the account of the bankrupt firm in the Hanover National Bank on certain specified dates.

That thereafter down to the date of failure, the balance was not drawn down below the amount of such so-called trust deposits.

That the business in which the bankrupt firm was engaged was that of buying and selling securities, much as merchandise,
39 and that their account in the Hanover National Bank was used for that purpose, and that the deposits or drafts appearing therein may reasonably be presumed to have been made or drawn for securities delivered by or received by the firm, as the case may be.

That in this manner the Bank balance was substantially entirely absorbed by the morning of the failure, Tuesday, August 25th; the payments charged on Monday the 24th amounting to $3,868,213.19 against deposits, inclusive of loans placed to the credit of the firm on that day, of $3,743,562.20.

That on Monday the 24th and Tuesday the 25th, collateral, consisting of securities presumably purchased in the ordinary course of business by the bankrupts through their Bank account as stated, were pledged with the Hanover National Bank, which collateral has since been sold by the Hanover National Bank, the surplus proceeds being returned to the Trustees, in addition to some unsold collateral.

That the foregoing establishes a mingling of the converted moneys of the claimant Bank in the mass of the estate and that part of such mass having been traced into the hands of the Hanover National Bank and subsequently returned into the hands of the Trustee, the claimant Bank has an equitable lien thereon for the amount of its claim to which priority should be accorded by order of this Court.

The difficulty in my mind is this:

While the proof no doubt traces the proceeds of the certificates received by A. O. Brown & Co. for the claimant and establishes that these proceeds were deposited in the firm's account in the Hanover National Bank on the dates specified, the question is does this proof identify those proceeds with any part of the estate as the latter came into the hands of the Receiver or the Trustee so as to give the claimant an equitable charge prior to the rights of the other creditors under the rule referred to.

Judge Hand's decision—its third paragraph—made on my first Report in this claim—points out that the proof must go farther than the mere receipt of the converted moneys, in order to bring about identification with or confusion in the general mass of the estate.

I call attention to the decision of the Circuit Court in Peters v. Bain, supra, 133 U. S. 670, given at pp. 678, 679, and the opinion of Fuller, C. J., in the same case, at p. 694, which case is referred to in the case of American Can Co. v. Williams, Recr. of the Fredonia Nat'l Bank, recently decided by the Court of Appeals in this Circuit, supra, 178 Fed. Rep. 420, and where the Court at page 423 writes as follows:

"It cannot be shown that property in the hands of a Receiver has been increased by trust funds unless it is shown that they were converted into or commingled with it. If the plaintiff's contention be well founded, and to follow misappropriated funds, it is only necessary to show that the Receiver has, and that the Trustee had, assets, the rule is simply that a demand for such moneys is a preferred claim against any substantial estate. To adopt this view is to do away with all the equitable principles out of which the right to follow trust funds grew."

In this case, the Fredonia Bank, before the appointment of the Receiver, had made collections for the American Can Co., but as to a part of the claim there was no proof at all connecting such collections with the assets of the Bank in the hands of the Receiver (p. 423), and the Circuit Court of Appeals affirmed the Court below in denying the plaintiff's claim to that extent.

The difficulty in applying the rule appears in In re Brunsing

Tolle & Postel, supra, 22 A. B. R. 129, pp. 130-131, where
41 the case was remitted to the Referee. This case is an instructive decision.

There was no such difficulty in In re Royea, supra, 16 A. B. R. 141, p. 142, which dealt merely with a Bank balance (greater than the $120. deposited therein for safe keeping) which had come into the possession of the trustee in bankruptcy; and there was no such difficulty in Erie Railroad Co. v. Dial, supra, 15 A. B. R. 559, where the rubber of which the proceeds were reclaimed had been converted into a stock of tires, the larger part of which came into the possession of the Receiver or the Trustee. And Boone Co. National Bank v. Latimer, supra, 67 Fed. Rep. 27, deals only with a Bank balance, and the claim was confined by the Court to that balance: see bottom of page 29.

On the other side of the question, the following cases Smith v. Motley, supra, 17 A. B. R. 863, page 867, Frelinghuysen v. Nugent, supra, 36 Fed. Rep. 229, quoted at length in American Can Co. v. Williams, supra 178 Fed. Rep. 420, page 424, which latter case in turn is the subject of discussion in In re Stewart, supra, 178 Fed. Rep. 463, pp. 476, 477, tend to uphold the contention of the claimants that the testimony here sufficiently establishes, as to the claimant's moneys, a conversion into or a mingling with the estate taken over from the Hanover National Bank by the Receiver.

I repeat that the difficulty in cases of this character lies in the application of the rule.

On given testimony different minds may well reach different conclusions.

On given testimony, the conclusion whether or not such a conversion into or mingling with the mass of an estate, in the possession of a Receiver or Trustee, has been established as will support a charge upon the mass in favor of a claimant, seems to me, in its ultimate expression, to be one really of law rather than of fact.

The testimony here warrants a finding, and I so find, that all the moneys in the Hanover National Bank on Monday the
42 24th, viz: the opening balance which it may be presumed included the claimant's moneys and the moneys of similarly situated claimants (see the tabulation appended to this report), the deposits of that day resulting from the sale of securities, the loans of that day made by the Hanover National Bank, whether secured or not by collateral, were all applied to the purchase of a general stock or mass of different kinds of securities. This is evident from the refusal of the Bank to certify the check given to A. H. Combs & Co. for the 4300 shares of Reading bought from A. H. Combs & Co. by A. O. Brown & Co. and by the latter sold to and paid for by Newborg & Co. on the 24th.

As stated, the general mass of stock thus purchased consisted of many different kinds of securities, and I am not satisfied that the claimant has succeeded in identifying its moneys with the purchase of the securities pledged with the Hanover National Bank on Monday and Tuesday, to secure the five loans disclosed in the testimony,

a portion of which securities or their proceeds constitute the fund now in the possession of the Trustee.

The claimant's counsel contends that no such burden rests upon the claimant, and takes the position that identification with the purchase of a general miscellaneous stock is sufficient. This view seems to differ little from that rejected by the Court in American Can Co. v. Williams, ubi supra; but see Erie R. R. Co. v. Dial, ubi supra.

I am constrained, therefore, to the conclusion that in this investigation (permitted to the claimant under In re A. O. Brown & Co. supra, 23 A. B. R. 423, p. 426), the claimant has not made out a case entitling it to the order asked for.

I report accordingly that the Trustee is entitled to an order denying the claimant's petition in reclamation, without prejudice to the claimant's right to prove as a general creditor and to participate in any dividend already declared or hereafter to be declared.

(Endorsed:) Referee's Report filed.

43 United States District Court, Southern District of New York.

No. 11277.

In the Matter of A. O. BROWN & COMPANY, Bankrupts.

NEW YORK, *May* 14, 1909—2 p. m.

Hearing on Reclamation of Schuyler, Chadwick & Burnham.

Before John J. Townsend, Special Master.

Appearances:

Mr. Crisp for Claimants.
Mr. Wolf and Mr. Kaufman for Trustee.

CHARLES L. BURNHAM, a witness called on behalf of the claimants, being duly sworn, testified as follows:

By Mr. CRISP:

Q. What was your business in August of 1908?
A. Broker of the firm of Schuyler, Chadwick & Burnham.
Q. I believe your firm is a stock exchange house?
A. Yes, sir.
Q. Who is the stock exchange member of the firm?
A. S. S. Schuyler.
Q. Do you know the firm of A. O. Brown & Co?
A. I do.
44 Q. You know who were the members of that firm, in August, 1908?
A. Yes.
Q. Please state who they were?

A. A. O. Brown, Lewis Young, E. F. Buchanan, G. L. Stout, and W. R. Whitman.

Q. Who were the stock exchange members of that firm?

A. A. O. Brown and Lewis Young.

Q. Did your firm have any business transactions with A. O. Brown & Co., on the 24th day of August, 1908?

A. Yes, sir.

Mr. CRISP: I would like to amend the petition in page 5, with reference to the year 1905; that should be 1908

Q. Did you have charge of the transactions on behalf of your firm?

A. The preliminaries.

Q. Which member of the firm did you have your transactions with?

A. E. F. Buchanan.

Q. What was the exact date?

A. 24th day of August, 1908.

Q. Mr. Burnham, please state as concisely as you can, just exactly what took place between you and Mr. Buchanan from the commencement of that transaction to the end?

A. Somewhere about the middle of the day, or a little after, Mr. Buchanan called me personally on the telephone and asked me if I had any stock that I could loan him, mentioning several classes. I hesitated and while I was waiting, he asked me if I could come over and see him without going any further into the request. He stated he was busy and could not come out, otherwise he would come out and see me.

Q. When Mr. Buchanan requested you to come to his office, did you go there?

A. I did.

Q. Please state exactly what took place there?

A. I was shown at once into his private office, where he was seated at his desk. He greeted me very cordially, and said "Now, Charlie, before you say a word, I want to tell you something. You probably heard a lot of talk about us in the street. There is nothing in it. We are absolutely solvent. We have got to deliver some stocks and we are hustling to get them, but we are in no sense of the word embarrassed, and we have millions of money in cash. Now I want to borrow some stock from you. If it is necessary take it out of loans"——

SPECIAL MASTER:

Q. Are you giving his words?

A. I am quoting him; yes, sir.

(Witness continuing:) "While we have some little difficulty in getting stock to deliver, we have millions of money. Plenty of cash. Here is a list of what I require. Can you let me have any of it or all of it?" I told him that I thought we had very little, a very small part of it. I could let him have some Interborough. I knew that I had some. He said "Send it right in." Soon after I returned to

my office; and in the ordinary course as soon as it could be done, I delivered the stock—I know it was delivered and I know it was delivered promptly. 300 shares of Interborough Preferred at 32. I did not personally deliver the stock.

Q. Where did you have these 300 shares of stock?

A. In our box.

Q. And what was the market price of it, at that time?

A. 32. It was delivered to them at 32.

Q. What was the agreement and understanding with reference to the return of that stock?

A. The custom of the street took care of that. It was un-stood that the stock was to be returned to us, of course.

Q. At the market price at the time of its return?

A. Yes.

Q. What is the custom with reference to a loan of that character?

A. That it is returned at the market price.

Q. Your firm sent 300 shares of Interborough Preferred stock to A. O. Brown & Co.?

A. Yes, sir.

Q. On August 24th?

A. Yes, sir.

Q. Did you receive a check back?

A. No, sir.

Q. What did you do when the check was not returned?

A. In accordance with the custom of the street, very often the boy will put the stock in the window and they will tell him to come back for the check.

Q. When the check did not come back by your messenger?

A. We sent down for it in a little while and asked for it.

Q. You sent a messenger for the check, is that the idea?

A. Yes, sir.

Q. Did you get a check back?

A. No.

Q. Did you repeat it several times in the afternoon?

A. Yes.

Q. Did you finally get a check?

A. Yes, finally got the check.

Q. At about what time of the afternoon of that day?

A. At about 4 o'clock or after. Too late to have the check certified at the bank.

Q. What did you do with reference to that check on the following day?

A. We had one of our young men there before 10 o'clock waiting to have it certified before the bank opened.

Q. And was he able to get it certified when he presented it?

A. No.

Q. The first time?

A. No.

Q. Did you send him back?

A. I did, yes, sir.
Q. And was he successful the second time?
A. No, sir.
Q. Did you repeat that several times, sending him back to the Bank for the purpose of having the check certified?
A. Yes, sir.
Q. And you did not succeed in getting it?
A. No, sir.
47 Q. And your firm has never received the amount of that check to this day?
A. No, sir.
Q. I understood you to say that Mr. Buchanan called you up on the telephone and asked for a loan of stock, and that you hesitated?
A. I did.
Q. Why?
A. Well, the previous Saturday their transactions had been very spectacular, the whole street was talking about A. O. Brown & Co., and I think I did what it was natural to do. I hesitated to have any transactions with them.
Q. It was only upon the statements made that you loaned the 300 shares of stock?
A. Yes, sir.
Q. You would not have loaned them otherwise?
A. No, sir.
Q. Look at the check which I now show you, Mr. Burnham, and state whether or not that is the check which you received from A. O. Brown & Co. for that stock on that day?
A. Yes, sir; that is the check.

It is conceded that the check is the check of A. O. Brown & Co. and for the purpose of putting it in the record, I will read it.

The face of the check reads as follows:

"New York, August 24, 1908. The number in the left hand corner is 38051. Across the top of the check is A. O. Brown & Co. The Hanover National Bank of the City of New York, pay to the order of Schuyler, Chadwick & Burnham, Ninety six hundred dollars. $9600. in figures in lower left hand corner. The check is signed A. O. Brown & Company, by G. Lee Stout.

Received in evidence and marked "A. O. Brown & Co., Schuyler Exhibit 1," of this date.

Q. Mr. Burnham, on the back of this check are the words: "Pay to Manhattan Company or Schuyler, Chadwick & Burnham." Was that check ever deposited in the Manhattan Company?
48 A. No; it was not. It was stamped and if it had been certified would have been put in the Bank.
Q. So that it never passed through your Bank, and you never received the proceeds of it?
A. No.
By Mr. WOLF: You loaned to A. O. Brown & Co. 300 shares of Interborough Preferred on August 24, 1908?
A. Yes, sir.

By SPECIAL MASTER:

Q. This Mr. Buchanan and yourself were you socially intimate, except as brokers?

A. I had known him personally for years. I cannot say that I knew him socially, but as an officer of the Stock Exchange, I used to see him.

Q. You were an officer of the Stock Exchange?

A. At one time. Formerly assistant secretary and for two or *the* three years acting secretary. So that I knew him personally, I may say, for years, but I do not think I can say I knew him socially.

By Mr. CRISP:

Q. Your firm had had numerous other business transactions with him?

A. Yes, sir.

Q. All of which had been satisfactory?

A. Comparatively so.

WALTER B. TUTHILL, a witness called on behalf of the claimants being duly sworn, testified as follows:

By Mr. CRISP:

Q. How old are you, Mr. Tuthill?

A. Twenty-six.

49 Q. And in what business were you in the month of August 1908?

A. I was bookkeeper in the firm of Schuyler, Chadwick & Burnham.

Q. Do you remember any transaction between the firm of Schuyler, Chadwick & Burnham and A. O. Brown & Co., on August 24, 1908?

A. I do.

Q. Please state what you know about it?

A. It was arranged by Mr. Burnham that we should loan to A. O. Brown & Co., 300 shares of Interborough Preferred, which were delivered to them.

Q. Did you deliver the stock?

A. I did not; one of our messengers delivered it.

It is conceded that 300 shares of Interborough Preferred stock was delivered to A. O. Brown & Co., on the day referred to.

Q. At about what time of the day was that, do you remember?

A. I should say it was delivered between 1:30 and 2 o'clock.

Q. What do you mean by a loa*d* such as you have described?

A. A loan of stock which is delivered from one stock broker to another, for which he pays him the market price.

Q. Under what arrangement with reference to its return?

A. When it is returned it is returned for the same amount for which it is loaned, unless the stock has increased or decreased in value, in which event the loaning broker sends to the man to whom he has loaned the stock requesting that he mark it at the market

price giving him a check for the difference. He also has the privilege of requesting the party from whom he is borrowing the stock to do the same.

Q. If the stock depreciates what takes place?

A. If the stock depreciates the borrower sends to the lender requesting him to mark it.

Q. When a loan is made, the borrower has the option of returning the stock at the period it is called for or at a period when
50 he desires to return it?

A. He has.

Q. Assuming that when it is called for by the lender, the stock has gone up, he either has the option of returning the stock or returning the market value of the stock in cash?

A. If it is returned through the Clearing House, he does have the privilege of returning it.

Q. In case the stock has depreciated at the time, what takes place?

A. It is returned for the same amount it is loaned.

Q. Will you explain what you mean by a loan of stock such as was given in this case, and give an example of it?

A. In case Schuyler, Chadwick & Burnham should loan to any firm 100 shares of stock for $10,000, after such loan had been made should the price of the stock fluctuate, either the borrower or the lender would have the privilege of calling upon the other party to the transaction to market the stock at the market.

Q. Can you remember what the numbers of the stock certificates were which were delivered by Schuyler, Chadwick & Burnham to A. O. Brown & Co.?

A. I do not.

Q. Have you anything which will refresh your recollection?

A. We have our stock blotter of that date.

Q. Will you please produce it and turn to the page of the book where that is shown?

Witness produces stock blotter of Schuyler, Chadwick & Burnham, and refers to the date August 24, 1908, which Mr. Crisp offers in evidence.

Received and marked A. O. Brown, Schuyler Exhibit 2.

Q. Please read from the book which has now been offered in evidence the particular item referred to?
51 A. Witness reading: "August 24, 1908, delivered to A. O. Brown & Co. account of stock loan 300 Interborough Met. Preferred. Numbers 8386 and 8387 and 8245.

Q. Those figures, as I understand, represent the numbers of the certificates of stock which were turned over?

A. Yes, sir.

Q. How many shares were represented in each?

A. 100 shares.

Q. Amounting in the aggregate to 300?

A. Yes, sir.

Q. When that stock was delivered, did you receive a check back for it?

A. We received a check; but not at once. After making repeated attempts to get a check, about 4 o'clock, too late for certification, we received the check.

Q. What did you do the next day with reference to it, if anything?

A. I had nothing to do with it the next morning.

Q. Did you send any one with reference to it?

A. One of our messengers, Alfred Tobias, who is still with us.

Q. You sent him to the Bank how often?

A. He was there at least half a dozen times before 10 o'clock.

Q. And after 10 o'clock?

A. After 10 o'clock, also.

Q. Was he there at 10, do you know?

A. He was there at 10.

By Mr. WOLF:

Q. Did you take the 300 Interborough to A. O. Brown & Co. yourself?

A. I did not.

Q. Do you know who did that?

A. I cannot say.

Q. You did not personally deliver it to A. O. Brown & Co.?

A. I did not.

52 FELIX T. HEYMANN, a witness called on behalf of the Petitioner, being duly sworn, testifies as follows:

Direct examination by Mr. CRISP:

Q. What is your name?

A. Felix T. Heymann.

Q. What is your business?

A. Employed as assistant cashier with Miller & Company.

Q. Were you employed in August 1908?

A. Yes, sir.

Q. Did your firm have any business transactions with A. O. Brown & Company on August 24, 1908?

A. We did, yes, sir.

Q. Please state what they were?

A. We had received from A. O. Brown & Company account of the Clearing House a number of different stocks, part of which they delivered to us and the rest they failed to deliver.

Q. You received a number of shares of stock on that day?

A. Yes, sir.

Q. Did that delivery include any Interborough Preferred?

A. Yes, sir, 300 shares.

Q. 300 shares?

A. Yes, sir.

Q. And at what price were they delivered to you on that day?

A. At 32.

Q. What time in the day did you receive them?
A. Well, I could not tell you the exact time they were delivered to us.
Q. That is not important?
A. No.
Q. Do you recall all the numbers of the certificates of stock?
A. Well, I have it on record here.
Q. You don't recollect it without reference to the record?
A. No.
Q. Will you please produce such record as you have?

(Witness produces a sheet of the blotter of Miller & Company for the 24th day of August, 1908.)

Mr. CRISP: I offer it in evidence.

Received in evidence and marked Petitioner's Exhibit A. O. Brown, Schuyler No. 3.

53 Q. Will you please state what those were?
A. 300 shares of Interborough Preferred, Certificate No. 8,386, 8,387 and 8,245.
Q. Did you deliver a check to A. O. Brown & Company for that stock?
A. Well, we delivered a check including that stock and also some others.
Q. As I understand you you gave one check to pay for all of the stock which was delivered to you?
A. Delivered to us, yes, sir.
Q. On that day?
A. Yes, sir.
Q. And the check which you gave them included $9,600 to cover the 300——
A. (Interrupting.) 300 shares of Interborough Preferred, yes, sir.
Q. Can you give me the statement of the figures which made up that check?
A. It was a payment of 1,000 shares of Northern Pacific for $143,000, 1,000 shares of Great Northern Preferred, $137,000 and 300 shares of Interborough-Met. Preferred for $9,600.
Q. That makes a total of how much, sir?
A. $289,600.
Q. How much does it make, $289,600?
A. Yes.
Q. Now will you look at the check which I now show you and state whether or not those were the checks which you gave in payment for those deliveries?
A. Yes, sir.

Mr. CRISP: I offer them in evidence.

Received in evidence and marked A. O. Brown, Schuyler Exhibits Nos. 4 and 5.

Mr. CRISP: I will read into record, if your Honor please: "Miller & Company, No. 14,908, New York, August 24, 1908. Pay to the order of A. O. Brown & Company $266,600 (then in words)

Two hundred and sixty-six thousand six hundred dollars. In the left hand corner Phœnix National Bank through the Clearing House, signed Miller & Co. It is endorsed on the back, pay to the order of the Hanover National Bank of New York, A. O. Brown & Co., and then still further endorsed on the back received pay-
54 ment August 24th through New York Clearing House, Hanover National Bank.

Exhibit No. 5 reads as follows: Miller & Co. No. 17,654, New York, August 24, 1908. Pay to the order of A. O. Brown & Co., $23,000 (and then in words) Twenty-three thousand dollars, and in the left hand corner Mechanics National Bank of New York City and under that, not over $25,000, signed Miller & Co. Across the face of the check are the following words: Accepted payable through New York Clearing House, August 25, Mechanics National Bank, New York City, N. Y. Referring to the first exhibit No. 4, that also has across the face of it, accepted, payable through New York Clearing House, August 24, 1908, Phœnix National Bank. The second check, Exhibit No. 5 has the following endorsement across the back: Pay to the order of Hanover National Bank of New York City, A. O. Brown & Company, and also the following, received payment August 25, 1908, New York Clearing House, Hanover National Bank.

Q. Will you explain why two checks were given for that delivery on that day?

A. I don't know whether I would care to state the reason why. I know there was a payment held back on the check for $23,000, and thereby that second check comes in.

Q. But they subsequently demanded that check, did they not?

A. Yes, sir, which we paid them.

Q. And you gave it to them on that day, the 24th day of August?

A. Yes, sir.

Q. Do you remember what time of the day that transaction took place?

A. The check for $23,000?

Q. For both transactions?

A. One was received before 3 o'clock,—for $266,600, and the other was received between half-past three and four o'clock.

No cross-examination.

55 ALFRED TOBIAS, a witness called on behalf of the Petitioners, being duly sworn, testifies as follows:

Direct examination by Mr. CRISP:

Q. What business were you in on the 24th day of August, 1908?

A. Schuyler, Chadwick & Burnham.

Q. In what capacity?

A. Ticket clerk and comparison clerk.

Q. Did you have anything to do with a transaction between

A. O. Brown & Company and Schuyler, Chadwick & Burnham on that date?

A. I did.

Q. State what it was?

A. I received the check that came in from A. O. Brown and figured it up and found that they paid us $9,600 shy, according to the figures.

Q. Yes.

A. And in checking up I found it must be for 300 Interborough and immediately sent down to have them give us a check for that amount.

Q. Did you send down or did you go?

A. I sent down; I sent a boy down.

Q. Who delivered the stock, do you know?

A. That I couldn't say; I don't remember which one of the boys.

The REFEREE: Did you leave the office yourself?

The WITNESS: No, I didn't leave the office.

Q. Did you have anything to do with the check next morning?

A. Yes, I went to Brown's and I went to the bank.

Q. Take one first?

A. I went to the bank and tried to get it certified and they wouldn't.

Q. What time in the day was that?

A. I went there about ten o'clock.

Q. Before ten or after ten?

A. The check was there before ten with a boy; but I went there after ten.

56 Q. How much after ten?

A. I should judge about quarter past ten.

Q. And what did you do when you went there?

A. They just said "No funds." I went to A. O. Brown——

Q. Look at the paper which I now show you, being Schuyler Exhibit No. I of this date, and state whether or not that is the check which you presented at the bank?

A. That is the check I presented at the Hanover Bank.

Q. And is that the check which they refused to pay or certify?

A. It is the check which they refused to certify or pay.

Q. Did you go back again?

A. I went back to A. O. Brown.

Q. Did you go back to the bank?

A. I went back to the bank half a dozen times after that; every fifteen minutes I was at the bank.

Q. What did you do each time?

A. Presented it for payment, which was refused.

Q. Did you go to A. O. Brown & Company?

A. I went to A. O. Brown & Company and I saw the cashier.

Q. Do you know what his name was?

A. No, I do not know his name, just the cashier. I asked him about it and he said it was all right, take it up to the bank; and I

took it back to the bank and then went back there and told him; then I tried to see one of the firm which I could not do.

Q. That is all you had to do with it?

A. That is all I had to do with it.

Q. Do you know who delivered the stock to A. O. Brown & Company that day?

A. I do not.

Mr. CRISP: I don't think that is important, if your Honor please, because my friend concedes that the delivery was actually made to A. O. Brown and I found the stock in their possession.

57 The REFEREE: I guess they wouldn't give you a check unless it was delivered.

Mr. CRISP: I understand my friend is prepared to concede on the record that on August 24, 1908, the day on which this transaction took place and for several days prior thereto the firm of A. O. Brown & Company were absolutely insolvent and bankrupt, and on that day they did not have millions in cash nor as much as a million. Is that true, Mr. Wolf?

Mr. WOLF: I wouldn't say they didn't have as much as a million; I will admit they were insolvent on that day and for several days prior thereto.

Mr. CRISP: I could go further; but I think that admission is far enough. I could show their absolute indebtedness and their assets at the present time if your Honor thinks that is important.

The REFEREE: You say they were insolvent on August 24th and before then?

Mr. CRISP: That is the admission.

The REFEREE: That is all I am concerned with.

Mr. CRISP: Outside of showing the statement of the bank and the assets which they had in the bank on that day I shall want to close, —and that I will have in a few minutes.

58 In re A. O. BROWN & COMPANY.

Before Hon. John J. Townsend, Special Master.

Adjourned hearing on claim of Schuyler, Chadwick & Burnham.

NEW YORK, *July 8th*, 1908—at 12 Noon.

Present:

Schuyler, Chadwick & Burnham, by Mr. Crisp, by Mr. Randall, of 20 Broad Street.

Hays, Hershfield & Wolf, by Mr. Wolf, for the Trustee.

Mr. RANDALL: Our testimony is closed.

Mr. WOLF: I offer in evidence all testimony given by Mr. Carse of the Hanover National Bank, in the Morison Brothers case, together with all the exhibits refer-ed to in his testimony.

The MASTER: It is received subject to further cross-examination by Mr. Crisp.

Mr. WOLF: I also offer in evidence the report of the Special Master in re Morison Brothers, together with an order of the District Court entered thereon, by which I have been ordered to pay the Morison Brothers the sum of $17,000 with interest.

Mr. RANDALL: That would be subject to an opportunity given me to examine those documents and object to any parts thereof.

The MASTER: I will receive the report of the Special Master and the order of the District Court thereon.

Adjourned to July 20th, 1909, at 12 Noon.

59 On July 20th, further adjourned to July 27th, 1909, at —.

On July 27th, 1909, further adjourned to August 16th, 1909, at —.

On August 16th, 1909, further adjourned to August 24th, 1909 at 10 a. m.

On August 24th, 1909, further adjourned at the request of Mr. Crisp, to September 7th 1909 at 12 Noon.

In re A. O. BROWN & COMPANY.

Claim of Schuyler, Chadwick & Burnham.

Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *September 7th*, 1909—at 12 Noon.

By stipulation entered into between the parties hereto, it was agreed that all proceedings and hearings in the above entitled matter be adjourned without date, pending the outcome of an appeal to the Circuit Court of Appeals for the 2nd Circuit, in the matter of Morison Brothers.

It is further stipulated that either party may upon the determination, or outcome of the said appeal, bring the hearing herein on upon eight days' notice.

Adjourned without date.

60 HENRY R. CARSE, being called as a witness on behalf of the petitioner, and being first duly sworn by the Master, testified as follows:

Direct examination by Mr. DENNIS:

Q. Mr. Carse, in whose employ are you?
A. The Hanover National Bank.

Q. In whose employ were you between August 20th and September 15th, 1908?

A. Yes, sir, the Hanover National Bank.

Q. What is your position?

A. Vice-president.

Q. You occupied the same position during August and September, 1908?

A. No, I was assistant cashier at that time.

Q. You mean the latter part of August and the first of September?

A. Yes, sir.

Q. Are you familiar with the state of the accounts between the firm of A. O. Brown & Company and the Hanover National Bank, as they existed between August 20th, 1908, and September 15th, 1908?

A. Yes, sir, in a general way.

Q. Were you at the bank on August 24th, and 25th, and 26th, 1908?

A. Yes, sir.

Q. Did these accounts between the Hanover National Bank and A. O. Brown & Company come under your direct supervision on those dates?

A. Well, they would come under my general supervision; I would not do the detail work.

Q. Did they come under your general supervision?

A. Yes, sir.

Q. You were familiar with the status of those accounts at that time?

A. Yes, sir, I was.

Q. Will you please state whether or not there was on August 25th, 1908, deposited with the Hanover National Bank a certified check of A. O. Brown & Company by Trippe & Company to the order of A. O. Brown & Company for $17,300, said check having been drawn on the Corn Exchange Bank, and put through
61 the clearing house?

A. We have no record in our office which would enable me to say.

Q. To say what, the amount, or the name?

A. To say the name of the maker of the check, or the payee.

Q. Have you got a record of the dollars and cents of the check?

A. Well, we have the deposit slip here of A. O. Brown & Company, deposited on August 25th, 1908, a check for $17,300.

Q. Showing a deposit of $17,300?

A. Yes, sir,—a check drawn on the Corn Exchange Bank.

Q. But you have not the name of the maker of that check?

A. No.

Q. Have you with you all the deposit slips showing all the deposits made by A. O. Brown & Company with the Hanover National Bank August 25th, 1908?

A. Yes, sir.

Q. Was there any other check for that amount, that is, $17,300,

deposited with the Hanover National Bank by A. O. Brown & Company on that date?

A. No, sir.

Q. Can you tell at what hour, or at about what hour of the day, this check for $17,300 was deposited?

A. No, I have no way of telling.

Q. Can you tell on what day, or what hour of this particular day that check was paid?

A. That check evidently went through the clearing house the next morning and it was paid to us at ten o'clock, August 26th, through the clearing house.

Q. Then we are to understand that on August 25th, 1908, you received only one check for $17,300 deposited to the credit of A. O. Brown & Company and that that check was drawn on the Corn Exchange Bank and was paid through the clearing house at ten a. m. on August 26th?

A. Yes, sir.

Q. What day of the week was August 26th?

A. Tuesday was the 25th, and the 26th was on Wednesday.

62 Mr. DENNIS: I offer the deposit slip showing the deposit of $17,300 in evidence.

The same was received and marked Petitioner's Exhibit "2" of this date.

Mr. DENNIS: I ask that the deposit slip be copied into the record, and it is stipulated by Mr. Wolf that the deposit slip may be so copied, and that the original slip may be retained by the Hanover National Bank.

Deposited by A. O. Brown & Company in the Hanover National Bank, New York, August 25th, 1908.

Special	
Bills	
Checks	
(45)	$17,300.

Q. Mr. Carse, there is a pencil memo, enclosed in a circle, with the numbers forty-five inside, on this slip; what does that mean?

A. That is the clearing house number of the Corn Exchange Bank.

Q. That is the only significance of that?

A. That is all. It is customary for bank clerks to use the clearing house numbers rather than names.

Q. Now, Mr. Carse, have you with you any books, memo. or papers, showing the condition of the account of A. O. Brown & Company with the Hanover National Bank on August 25th, and 26th, 1908?

A. Yes, sir, I have here a copy of the account from August 20th until the time it was closed, September 5th, 1908; I also have the vouchers between those dates.

Q. Now, Mr. Carse, how was that account closed in September?
A. By giving a check for the balance to the Receiver.
63 Q. State his name, please?
A. Mr. Littlefield, Charles E.
Q. How much was that balance which was paid to him September 5th, 1908?
A. $2,055.97.
Q. Now, Mr. Carse, has this statement which you have in your hand, has that been made up by you personally?
A. No, it has been made up by our bookkeeper.
Q. Have you compared it personally with the books?
A. No, it is really not an exact copy from the books. For instance, on our ledger we charge each day the certified checks in bulk, but on this statement here we have listed them all separately, so this account is made up from our books, not from any one book.
Q. But have you personally checked this up with all your books?
A. No, I have not.
Q. Who did this work?
A. The bookkeeper in charge of that work.
Q. Do you know the name?
A. Yes, sir.
Q. What is his name?
A. Kemp.
Q. Do you know what his first name is?
A. I do not know.
Q. Spell it.
A. K-e-m-p.
Q. Is he still in your employ?
A. Yes, sir.
Q. And was at that time?
A. Yes, sir.
Q. Did he make the original entry?
A. I actually don't know; I don't think he did; he is at the head of the desk.
Q. Can you tell who did make the original entry?
A. We can find out,—we shift our bookkeepers from time to time.
Q. Now, Mr. Carse, does this statement which you have in your hand,—I will just offer it now for identification only.

Same admitted and marked Exhibit "3" for identification of this date.

Q. Now, Mr. Carse, this statement, marked as Morrison's
64 Exhibit "3" for identification of this date, did that include all the financial dealings between the Hanover National Bank and A. O. Brown & Company between those dates covered by this statement?
A. No, that did not include the liquidation of the collateral loans.
Q. Now, how many accounts did the Hanover National Bank have with A. O. Brown & Company between August 20th, and September 5th, 1908?
A. One account.

Q. Pardon me.

A. Only one account.

Q. Was that sub-divided into schedules?

A. No, this shows (referring to Morrison's Exhibit "3" for identification). This shows all the entries on the ledger; only it gives them in more detail than the ledger does.

Q. We understand that. Now then——

A. You will find in that account a certain credit for loans made to A. O. Brown & Company on August 24th and 25th, 1908.

Q. Yes, sir.

A. Those loans were with us when they made the assignment, and at the request of the assignee——

Mr. WOLF: I do not want you to put in what he said to you. Simply state what he did.

Q. This is the ordinary check book account?

A. Yes, sir.

Q. And it shows the loans you made to A. O. Brown & Company on collateral on different dates?

A. The credit, and all checks drawn against their account, and all debits made to their account.

Q. But the particulars of the loan did not appear in this Exhibit "3" for identification?

A. The particulars about the liquidation, about the loans, did not appear.

Q. The only thing that appears there is the amount you placed to A. O. Brown's credit for the loans?

A. Yes, sir.

65 Q. And the amount of collateral doesn't appear there?

A. No, just the amount.

Q. When you sold out the collateral, and got the money, didn't that appear on Exhibit "3" for identification?

A. No, sir. We sold the collateral and applied the proceeds in payment of the loans, and gave Mr. Littlefield a check for the balance over.

Q. But the sale from the surplus of this collateral does not appear in that account?

A. No, sir, we gave him a separate check for that.

Q. Did you on August 25th, 1908, pay anything whatever to A. O. Brown & Company direct?

A. I don't understand the question.

Q. Did A. O. Brown & Company on August 25th, 1908, draw any check payable to their own order?

A. The account shows that on August 25th, 1908, we paid by certifying a check for $146,600, that was dated August 24th, 1908, to the order A. H. Combs & Company, on check number 38071.

By Mr. WOLF:

Q. When was this check certified?

A. That was certified August 25th, 1908.

Q. Have you any means of telling what time on August 25th?

A. Why, it was certified very early in the morning, the first thing in the morning; this check was presented by Combs on August 24th.

Mr. DENNIS: I offer the paper in evidence.

Same admitted and marked Morrison's Exhibit number "4" of this date.

Mr. DENNIS: It is stipulated by Mr. Wolf that a copy of the original be read into the minutes, and that the original be retained by the Hanover National Bank.

The check was numbered 38071 dated New York, August 24th, 1908, to Hanover National Bank of the City of New York,
66 pay to the order of A. H. Combs & Company $146,600 in figures, and then the sum was spelled out, signed A. O. Brown & Company by W. R. Whitman. A. O. Brown & Company's name appears on the end. It is certified on the face, or endorsed upon the face certified payable only through New York Clearing House and the name Burns is written across the certification. The endorsements on the back are pay to the order of the National Bank of Commerce in New York, New York, A. H. Combs & Company, received payment through New York Clearing House August 25th, 1908, receiving teller, endorsements guaranteed, National Bank of Commerce in New York.

Q. Mr. Carse, how do you know that this check was presented for certification early on August 25th?

A. Because I handled it.

Q. Do you recall the transaction?

A. I recall the transaction clearly.

Q. What impressed it clearly on your mind, any event connected with this check?

A. All the events; the whole event.

Q. Had this check been presented before August 25th?

A. It was presented August 24th, and left with us over night.

Q. What happened August 24th, when it was presented for certification?

A. There was not sufficient balance to certify it.

Q. And your bank refused to certify it?

A. We held it over until the account was made good.

Q. Did you notify A. H. Combs & Company that you could not certify it August 24th?

A. Yes, sir.

Q. Because of an insufficient balance?

A. Yes, sir.

Q. Now, how soon did the balance become sufficient to enable you to certify the check?

A. I think, the best I can recollect, it was about ten.

Q. Did A. O. Brown & Company make a deposit on that day, August 25th?

A. Yes, sir.

67 Q. Can you look at your statement and tell what that deposit is?

Mr. DENNIS: Give all the deposits, in the order in which they were made.

A. That I cannot tell, because the deposits are not written on the ledger in the order in which they are received at the receiving teller's desk.

Q. Then give us all the deposits made by A. O. Brown & Company on August 25th, 1908?

A. They deposited $23,000, $4,000, $4,500, $4,860, $2,000, $5,000, *$5,000,* $3,332.53, $66,600, $17,300, $62.07, $165, and $1,367.47.

Q. Now after which deposit on the 25th of August, 1908, did you authorize the certification of this check?

A. After the deposit of $66,600.

Q. Do you know whether that was the first deposit made on the 25th of August or not?

A. It was the first to my recollection.

Q. How soon after the deposit did you authorize the certification?

A. Immediately.

Q. The deposit was not made until after the bank opened at ten o'clock in the morning?

A. I am not certain; we were there at half-past eight, and I don't know just the minute that any certain part of this transaction took place.

Q. Is there any record in your bank which would show what time the $66,600 deposit was made?

A. No, sir.

Q. Do you know who received it?

A. No, sir.

By Mr. DENNIS:

Q. That $66,600 and the other deposits which you have testified to are exclusive of the $17,300?

A. No, I included it there.

Q. Did you include it in with the $66,600?

A. In those I read off.

Q. How much of a deficit was there at the close of business of August 24th, 1908, which prevented you from certifying this check for $146,600?

68

A. There wasn't any deficit; we didn't have that amount there.

Q. How much short of $146,600 was their account at the close of business on August 24th, 1908?

Q. It would seem from this statement of account that the balance to the credit of A. O. Brown & Company's account at the close of business on August 24th was $6,180.17. I would like to confirm that,—that is given subject to correction.

Q. You consider that is substantially correct?

A. Yes, sir, it seems so from these figures.

Q. Now, when if at any time did A. O. Brown & Company deposit with you certificate of stock, or any securities, as collateral for advances or loans to them?

A. On August 24th they borrowed from us $50,000; they gave

us as collateral security five hundred shares of Great Northern preferred. August 24th they borrowed $80,000, and they gave us as collateral five hundred shares of Great Northern preferred, and two hundred shares of New York Central, and one hundred shares of Amalgamated Copper.

Q. That $130,000 was placed to the credit of their drawing account?

A. Yes, sir. On August 25th they borrowed——

Q. Wait a minute, have you finished with August 24th?

A. $85,000 was paid off the same day.

Q. On August 24th they borrowed and paid back $85,000?

A. Yes, sir, against collateral.

Q. How about this loan which is noted here on Exhibit "3" of $200,000?

A. That was paid back the same day.

By the MASTER:

Q. This balance at the close of business of $6,180.17, on August 24th, 1903, was that credited them with this $130,000?

A. Yes, sir.

69 By Mr. DENNIS:

Q. What other collateral did you have August 24th, and August 25th, 1908?

A. On August 25th we made them a loan of $250,000, against one thousand shares of United States Steel common, and three thousand shares of Amalgamated Copper, as collateral.

Q. As a loan for how much?

A. $250,000.

Q. Does that appear on that statement that you have submitted here marked Morrison's Exhibit number "3" for identification?

A. It should. We probably gave them a check for that $250,000. I would have to look that up.

By the MASTER:

Q. It doesn't appear in Exhibit number "3" for identification?

A. No, it does not (after examining Exhibit "3" for identification). On August 25th we also made them a loan of $8,000 against one thousand shares of Southern Pacific, common stock as collateral. They left with us sundry securities of which I will give you a list, with the idea that we should make them a loan on August 25th, but before the entries were actually made they had made an assignment so the loans were not placed to their credit. These securities were turned over to Mr. Charles E. Littlefield, the Receiver, September 5th, 1908.

Q. They were turned over as you received them, the exact, and same certificates?

A. Yes, sir, just the same.

By Mr. DENNIS:

Q. Now, Mr. Carse, there existed on August 25th, 1908, the re-

lation of debtor and creditor between the Hanover National Bank and A. O. Brown & Company, did there not?

A. Yes, sir.

70 Q. And in that relationship.

A. A. O. Brown & Company was creditor and the Hanover National Bank was debtor,—or how was that?

Mr. WOLF: Let us have the facts.

Q. Well, how was it?

A. A. O. Brown & Company had a balance to their credit on our ledger.

Q. Did your ledger contain any entries of anything but what you called their deposit account?

A. It contained all the debits and credits.

Q. Did it contain entries of securities which you held at that time?

A. Yes, sir.

Q. I mean stocks and bonds that you held as security for loans made by you to them?

A. It contained an entry of the amount we loaned them against stocks and bonds.

By the MASTER:

Q. Did it also contain the value, the market value of their collateral?

A. No.

By Mr. DENNIS:

Q. Did it contain a statement of what those stocks and bonds were?

A. No, it was simply a statement of debit and credit amounts.

Q. Did you have any statement showing what bonds you held as collateral, securing the payments you made to them?

A. The books at the loans.

Q. Have you those books with you?

A. I have copies of the slips we kept; we kept these records on slips.

Q. Did these records show the then market value of the stocks and bonds which you held as collateral?

A. No, sir, we didn't mark the value on the slip, as they varied from day to day, so that we figured them up.

71 By the MASTER:

Q. You could figure the market value of what you held at the close of business on August 25th, 1908, and you could also tell the balance of the cash in the drawing account subject to check?

A. Yes, sir.

By Mr. DENNIS:

Q. I believe you testified that at the close of business on August 25th, 1908, the Hanover National Bank was indebted——

A. No, August 24th.

Q. I am not speaking of August 24th, the Hanover——
A. I have been talking about the close of business August 24th.
Q. I am talking now about the close of business August 25th.

The MASTER: I understood him to say that on the 24th they were indebted in the amount of $6,180.17.

A. Yes, sir.
Q. And on August 25th, 1908, to what extent were you indebted on the so-called drawing account to A. O. Brown & Company, in addition to the amount of stocks and bonds which you held as collateral to secure loans made by you to them?
A. At the close of business on August 25th, 1908, the balance in the check account of A. O. Brown & Company was $3,562.24.
Q. You have not got an estimate of the value of their collateral——
A. I would like to finish this first. There was returned to us on August 26th, 1908, a check which had been deposited with us by A. O. Brown & Company for $1,500, the payment of which had been stopped, and there were protest fees making it $1,502, which we charged to the account, and we also charged the account exchange on the country items which they had deposited with us dur-
72 ing August amounting to $4.27, so the net balance was $2,-055.97.

By Mr. DENNIS:

Q. That was the checking account?
A. Yes, sir.
Q. According to your books?
A. Yes, sir.
Q. Did you actually get this check for $17,300,—I mean did you actually get the proceeds of the check for the $17,300 deposited on August 25th, 1908, before 10 o'clock on August 25th?
A. It went through the clearing house on August 26th, and we passed the check through at ten o'clock.
Q. So that you actually got either in cash or in credit the proceeds of this check for $17,300 you actually got this August 26th, 1908?
A. That is difficult to answer; I don't know just what would be the legal aspect of it myself. I don't know now whether we had a debit or credit. The balances are settled between twelve and two o'clock.
Q. So far as your relation with the Corn Exchange Bank, on which this check for $17,300 is drawn, is concerned, you collected that check on the morning of August 26th, did you not?
A. Well, according to the rules of the clearing house the banks have until three o'clock to return the checks which they will not pay.
Q. Did you get cash, or credit, which you regarded as cash?
A. We received credit as of ten o'clock, August 26th, 1908, yes, sir, because the check was not returned.
Q. Now, at the close of business on August 25th, 1908, what collateral did you have which had been deposited with you by A. O.

Brown & Company, without going into the values, unless you know them, and tell us the names and the numbers of the certificates, or securities?

A. I have copy here (passing papers to examining counsel).

Q. Is that a list of the securities?

73 A. That is a list of the securities they left with us with the idea that we would make an additional loan, which we did not make.

Mr. DENNIS: I hold here five slips of paper, which I ask to have marked as Morrison's Exhibit 5-A, 5-B, 5-C, 5-D, and 5-E.

Each of the slips was so marked.

Q. Will you explain the slips?

A. I will explain each of those slips as follows: Exhibit 5-A is for five hundred shares of Great Northern preferred against which we had loaned them $50,000. Slip 5-B is for five hundred shares of Great Northern preferred, and two hundred shares of New York Central, and one hundred shares of Amalgamated Copper, against which we had loaned them $80,000. Exhibit 5-C is for one thousand shares of United States Steel Common, and three thousand shares of Amalgamated Copper, against which we had loaned them $150,000. Exhibit 5-D is for one hundred shares of Southern Pacific common stock against which we had loaned them $800,000 Exhibit 5-E represents certificates for sundry stocks which had been left with us for purposes of a loan, which was not ultimately made. and these certificates were all delivered by us to Charles E. Littlefield, the Receiver, on September 5th, 1908.

Q. The securities enumerated in Exhibit 5-E were not sold by you at all?

A. No, sir.

Q. But were actually delivered to Mr. Littlefield?

A. Yes, sir.

Q. Now, then, the securities enumerated in Exhibit 5-A, 5-B, and 5-C, and 5-D,—what happened to them?

A. The one hundred shares of Southern Pacific common had been entered for transfer by A. O. Brown & Company, and we had as collateral the ticket of the transfer office, representing one hundred shares of Southern Pacific stock. That stock was enjoined

74 of delivery. So that we delivered to the Receiver on September 5th the transfer office ticket in this matter, and it was settled in some other way. The securities in 5-A, and 5-B, and 5-C were sold by us on August 26th, 1908, on the New York Stock Exchange.

Q. How much did they realize?

A. The proceeds received August 27th, 1908, amounted to $441,731.50. The interest charged by us was $133.84, leaving the amount to be applied on these loans $441,597.66.

Q. And the amount of the loan including Exhibit 5-E?

A. Was $388,000, leaving the balance $53,597.66, for which

amount we tendered our check to Mr. Charles E. Littlefield, the Receiver, on September 5th, 1908.

Q. At what time did you hand Charles E. Littlefield the check for this $2,000 which you have designated as the checking account?

A. September 5th, at the same time.

Q. Mr. Carse, on September 5th are we to understand that at the same time you handed to Charles E. Littlefield the check of the Hanover National Bank, one for $53,597.66 and another for $2,055.97?

A. Yes, sir.

Q. And those checks represented a large so-called loan account, and the small one, a so-called check account?

A. Yes, sir.

Q. And the two represented the balance due from the Hanover National Bank to A. O. Brown & Company, as at the close of business August 25th, 1908, except with respect to the adjustment of the interest down to September 5th?

A. Well, we sold the securities on August 25th. I don't know if we could have sold them at the same price on August 25th.

Q. And that comprised all the relations between the Hanover National Bank and A. O. Brown & Company, so far as the debit and credit account was concerned, at the close of business August 25th, 1908?

A. Yes, sir.

75 Q. Did Mr. Rohdes, the assignee after that withdraw any money from the Hanover National Bank?

A. No, sir.

Q. Or any money, was any money paid after the announcemnt of the assignment by A. O. Brown & Company by the Hanover National Bank, except to Mr. Littlefield?

A. No, sir.

Q. Did Mr. Rohdes, or did Mr. Brown, withdraw any certificates, any stock or bonds from the Hanover National Bank?

A. No, sir.

Q. From August 25th, 1908, on?

A. No, sir.

Q. Did they on August 25th, 1908, withdraw any certificates, stocks or bonds from the Hanover National Bank?

A. Not that I know of. I think anything would be shown, if they had made any substitutions, they would show in these slips (referring to papers). There is no indication of any substitutions having been made.

Q. Now, in making up your accounts with A. O. Brown & Company, and subsequently with Mr. Littlefield, the Receiver, you took into consideration, did you, all sums deposited and all sums withdrawn, and all moneys loaned by you, and all securities held by you as collateral therefor?

A. Yes, sir.

Cross-examination by Mr. WOLF:

Q. These so called loans against stock made to A. O. Brown & Company,—for instance, the loan on August 24th, 1908, for $50,000, against five hundred shares of Great Northern preferred, did you take any evidence of debt from Brown, to evidence that loan?

A. No, no special evidence.

Q. It was not accompanied by a note?

A. No, we didn't take a note. We have what we call a loan agreement, which we consider covers all loans made without a note.

76 Q. Have you a copy of that agreement?

A. No, but I can furnish you with one.

Q. Did you have one standing agreement, or did they sign a separate agreement each time you gave them a loan?

A. No, we had a standing loan agreement.

Q. And that loan agreement you considered covered every loan you made to A. O. Brown & Company against collateral of stocks?

A. We considered it covered all transactions between us, whether loans were furnished or otherwise, whether against collateral or without collateral.

Q. Will you please produce that at the next session, or furnish us with a copy of it?

A. Yes, sir.

Q. On Morrison's Exhibit "3" of this date, did the details of the deposits and checks appearing August 24th and 25th,—does each separate check appear?

A. Yes, sir.

Q. And each deposit?

A. Each deposit ticket, and each name on each deposit ticket.

Q. Have you the deposit tickets for August 24th and August 25th?

A. Yes, sir.

Q. May I see them?

A. Certainly.

Q. Will you kindly prepare for the next session a duplicate set of the deposit slips of August 24th and 25th, which we can offer in evidence in lieu of the originals?

A. Yes, sir.

Adjourned to January 8th, 1909, at 10.30 a. m.

HENRY R. CARSE, previously sworn, resumed the stand.

Direct examination continued by Mr. DENNIS:

Q. I believe you testified about the opening of business on August 25th, that is about ten o'clock on the morning of that day,

77 you certified a check drawn by A. O. Brown & Company to the order of A. H. Combs & Co. for $146,600.00; is that correct?

A. Yes, sir.

Q. When was that check for $146,600.00 first presented to you for certification?

A. The day before.

Q. The afternoon of August 24th?

A. On the afternoon of August 24th.

Q. Now, in the meantime, did A. O. Brown & Co. either on the afternoon of August 24th or the morning of August 25th deposit with you certain securities, which were to be the basis of a loan, and which you have already testified was subsequently returned to the Receiver?

A. On the morning of August 25th.

Q. I believe you testified you contemplated making a loan, but didn't actually make the loan, is that correct?

A. Well, we arranged to make the loan, had calculated it in our figures, but the assignment was made before the actual entries had passed through our books, so we simply did not put them through.

The MASTER: My recollection is that you turned back the securities.

The WITNESS: Yes, sir.

Q. These securities were all returned in specie, as it were, to the Receiver?

A. Yes, sir.

Q. How much of a loan did you figure these securities would stand?

A. We figured they would stand a loan of $25,000 to $30,000.

Q. And that was the amount you had contemplated in your mind that you would loan?

A. Yes, sir.

Q. Now, Mr. Carse, was there a check for $80,000 drawn by A. O. Brown & Co. to the order of A. H. Combs & Co. presented to you for certification on August 25th?

A. How much?

Q. $80,000?

A. Well, there may have been, there was a great deal of
78 talk, but I didn't certify it.

By the MASTER:

Q. Have you any independent recollection of it?

A. Well, not absolute recollection. There was some talk of certifying a certain amount, but I said I wouldn't do it, because it was dated that day, and there might be some other checks ahead of it.

By Mr. DENNIS:

Q. Now, isn't it a fact upon your making that statement a check was deposited by A. H. Combs & Co. to the credit of A. O. Brown & Co. for $66,600?

A. No, there was no deposit made by A. H. Combs & Co. Any deposit we received was received from A. O. Brown & Co.

Q. Whose check was it for $66,600 if you know?

A. It was a check, according to our records, for $66,600 drawn on the National Bank of Commerce.

Q. By whom?

A. I don't know as I saw the check paid, I believe it was A. H. Combs & Company's check.

Q. So that instead of your certifying a check for $80,000 they made a deposit of $66,600 the deposit was made of A. H. Combs & Company's money to the extent of $66,600 thereupon you certified the check for $146,600?

A. I don't know whether it was A. H. Combs & Company's check or not. A deposit was made in A. O. Brown & Company's account by A. O. Brown & Company.

Q. Your understanding was that was A. H. Combs & Company's check?

A. Yes, sir, that is my recollection.

By the MASTER:

Q. What do you mean by A. O. Brown & Company,—by whose hand if you know?

79 A. No, I don't know by whom it was deposited,—whether by some member of the firm or any employee; it was handed in on this ticket (producing the deposit slip) I don't know who made up the ticket; that is the original ticket by A. O. Brown & Co. just as though it came from A. O. Brown & Company's office.

Mr. DENNIS: I offer the paper in evidence, and also ask that it be copied into the records.

Same received and marked "Morison Exhibit #7" and the same was copied in the record as follows:

Deposited by A. O. Brown & Company, in the Hanover National Bank, New York, 8, 25—'08

Specie .....
Bills .....
Checks ..... 66,600."

Q. Now, Mr. Carse, do you recollect about what time of day this check for $66,600 was deposited?

A. Well, I should say somewhere about 10 o'clock.

By the MASTER:

Q. On August 25th?

A. Yes, sir.

By Mr. DENNIS:

Q. And thereupon you immediately certified the check for $146,600 which had been presented for certification on the previous day, is that correct?

A. Yes, sir.

Q. Now at that time had the check for $17,300 drawn by Trippe & Co. to the order of A. O. Brown & Co. been deposited, as far as you know?

A. I do not know.

Q. Should it prove that check was not deposited on August
80 26th before 12 o'clock, could you say whether or not the amount of that check had been figured in your calculations?

A. If that check for $17,300 was not deposited before 12 o'clock, it was not counted.

Q. It did not figure?

A. It did not figure in these amounts that that covers, the certification of the $146,600.

Q. Suppose that that check drawn by Trippe & Co. to the order of A. O. Brown & Co. deposited in the Hanover National Bank on August 25th was not deposited before 11 o'clock, did it figure in your certification?

A. I cannot swear to the actual time of it because it goes in—in comparing back times on that morning I have been an hour out of the way with other people's recollection.

By the MASTER:

Q. You are certain if it came in after 12 it didn't figure in your recollections?

A. Yes, sir.

By Mr. DENNIS:

Q. How about half-past eleven, what is your best opinion or judgment, about that?

A. My best judgment—

Mr. KAUFMAN: I object to what his best judgment may be.

Mr. DENNIS: I will frame the question omitting that.

Q. What is your best recollection?

A. I should say that if it came in after 11 o'clock it would not have been counted in my figures.

Q. In certifying the check?

A. For $146,600.

Q. Although you had ample security, figuring on the loan value of this bunch of securities that was deposited, and afterwards returned to the Receiver?

A. Yes, sir.

81 Q. Now, Mr. Carse, have you any independent recollection about the time this check for $17,300 was deposited?

A. No, I have not.

Q. Do you recollect having any conversation with Mr. Buchanan, or any other member of the firm, or any of the employees of the firm of A. O. Brown & Co., with reference to this check or the return of it?

A. Well, yes, there was something; I cannot say whether Mr. Buchanan spoke to me directly over the phone, or whether he spoke to some employee of the office, or whether some employee of the office of A. O. Brown & Co. spoke direct to me, or to one of our clerks.

Q. You mean the bank was communicated with?

A. Yes, sir, some one from A. O. Brown & Company's office called up the Hanover National Bank, and the question was put to me whether we could return the check for $17,300 which had been

given in payment for some stock, and my reply was "No, we cannot do anything because you have made an assignment."

By the MASTER:

Q. I don't quite understand that, whether you could retain or return?

A. Return the check, and my reply was "that we could not as they had made an assignment, and everything we had we were bound to hold subject to the order of the assignee.

By Mr. DENNIS:

Q. Do you recollect how soon this conversation occurred after the assignment,—after you received notice of the assignment?

A. Very soon.

Q. Almost immediately after the notice of the assignment?

A. It was, as it was seen by me on the tape.

Q. You are sure the inquiry was made almost immedi-
82 ately after the assignment was brought to your attention by the tape?

A. Yes, sir.

Q. Now, Mr. Carse, in making up the statement which you rendered to the Receiver, on the basis of which you settled with the Receiver, by the return of the securities, and by the payment of the sum of $2,000 or $3,000 from the so-called checking account, and by the payment of a sum of $53,000 in the so-called loan accounts, you treated the deposit of the $17,300 as a part of the checking account, and as though it had not figured in the certification of the check for $146,600?

A. Yes, sir.

By the MASTER:

Q. Then you credited the account of A. O. Brown & Co., the deposit account, with $17,300?

A. Yes, sir.

By Mr. DENNIS:

Q. So that treating the matter in that way that relieved the securities which were deposited by A. O. Brown & Co. with you on the morning of August 25th and which was subsequently in specie turned over to the Receiver from all lien- of every kind arising out of the certification of that check?

—. ——.

83 In re A. O. BROWN & COMPANY.

Morrison Petition.

Before Hon. John J. Townsend, Special Master.

Adjourned Hearing.

NEW YORK, *February 2nd*, 1909—3:30 p. m.

Present:

Mr. Wolf, for the Trustee.
Mr. Dennis and Mr. Milliken, of Counsel for the Petitioner.

WILLIAM T. SHIVELLE, being called as a witness on behalf of the Trustee, being first duly sworn by the Master, testified as follows:

Direct examination by Mr. WOLF:

Q. Mr. Shivelle, what is your business at present?
A. I am the blotter clerk for Carlisle, Mellick & Company.
Q. A New York Stock exchange house?
A. Yes, sir.
Q. Prior to August 25th, 1908, what was your occupation?
A. I was receiving clerk for A. O. Brown & Company.
Q. As receiving clerk, what was your duties?
A. Received stocks, entered the numbers, made records of money paid, and from whom received.
The MASTER: Money paid in, or money paid out?
The WITNESS: Money paid out.
Q. Anything that came in?
A. Everything that went out.
Q. How long had you been receiving clerk for A. O. Brown & Company, prior to August 25th, 1908?
A. About two years and six months.

84 EXHIBIT 5-A.

(Copy.)

W.

No. 1530.

A. O. Brown & Co.

8/25

[1¼]*% 6

18002[50]
[50,000]* Aug. 24, 1908.

[500 Gt. No prf]*

% Check to Recr
Sept. 5, 1908.

[On Back.]

68.002[50] pd 8 27/08 CK F W G Jr & Co.
on # 2
100 @ 136½
100 " 136¼
300 " 136

[* Words and figures enclosed in brackets erased in copy.]

85

EXHIBIT 5-B.

(Copy.)

W.

No. 1519.

A. O. Brown & Co.

8/25

[1¼]*% 6

16.646⁵⁰
[$80,000]*

AUG. 24, 1908.

[500 Gt No pf]*
[200 N Y Cent]*
[100 Copper]*

% Check to Recr.

[On Back.]

96,646⁵⁰ pd 8/28/08.

500 Gt. No pr.....	68,102.50
200 N Y Cent.....	20,821.
100 Copper	7,723.

[* Words and figures enclosed in brackets erased in copy.]

86 EXHIBIT 5-C.

(Copy.)

No. 1546.

A. O. Brown & Co.

6%

26,948⁸⁸
[$250,000]* AUG. 25, 1909.

[1,000 Steel]*
[3,000 Copper]*

% Check to Recr.

[On Back.]

276,948⁸⁸ pd 8/27/08.

1000 Steel.....	45,042.50
3000 Copper.....	232,040.
	277,082.50
Less Int. on all Loans to date.....	133.84

1546
1519
1530
1553

87 EXHIBIT 5-D.

(Copy.)

W.

No. 1553.

A. O. Brown & Co.

6%

$8,000. AUG. 25, 1908.

---

100 So. Pac.

[On Back.]

NEW YORK, —— —, 190-.

Received collaterals on the within mentioned Loan. Receipt of Southern Pacific Co. for 100 shs. intf.

(Signed) CHAS. E. LITTLEFIELD, *Recr.*
A. O. BROWN & CO.

[* Words and figures enclosed in brackets erased in copy.]

88

EXHIBIT 5-E.

(Copy.)

No. —.

A. O. Brown & Co.

25000 or 30000 loan.

Aug. 25, 1908.

---

200 Rep Steel
15 Ice Secs
10 Hide & L
5 Chicle
200 Am Brake Shoe
5 Brooklyn Un Gas
1 Cent L R prf
5 Rock Ise
5 Wabash
5 W & L E 1 pf
20 In & M Mar prf
30 United Copper
10 No Sec Stubs
295 Nev Utah
1440 Nipissing
13 Newhouse
550 Greene Cananea
490 Cumb Ely
200 Chgo Subway
100 Con Arz Sm & Ref
200 Brit Col Copper

50 Penna
5 No pac
5 Atch
5 Steel

[On Back.]

NEW YORK, *Sep.* 5, 1908.

Received Collaterals on the within mentioned Loan.

(Signed) C. E. LITTLEFIELD, *Receiver.*
A. O. BROWN & CO.

89 United States District Court, Southern District of New York.

In Bankruptcy. No. 11277.

In the Matter of ALBERT O. BROWN et al., Bankrupts.

Report of Referee as Special Master on Reclamation of Morison Brothers.

To the Honorable Judges of the District Court of the United States for the Southern District of New York.

I, John J. Townsend, Referee in Bankruptcy in charge of this case, to whom as Special Master have been referred for examination, testimony and report, the petition in reclamation filed by Morison Brothers, October 26, 1908, and the answer thereto filed on the same day by the Receiver, since elected the Trustee,—do report as follows:

I have been attended on behalf of the claimants by H. B. M. Dennis, Jr., and on behalf of the Trustee by Mr. Wolf.

I have taken the testimony of Percy M. Sneckner, bookkeeper of the claimants (p. 210); of Russell Freeman, cashier of the claimants (pp. 11-12; 36-40); of Hugh McIntyre, a clerk or messenger in the employ of the claimants, who made in the forenoon of Tuesday, August 25th, 1908, the delivery to A. O. Brown & Co. of the stock, out of which arises the present controversy (pp. 13-28; 68-69); of Lomax Littlejohn, Jr., cashier of the firm of Trippe & Co. (p. 29), to whom said stock was delivered by A. O. Brown & Co., on Tuesday, August 25, 1908, and whose check for its value,
90 $17,300, to the order of A. O. Brown & Co., was deposited to their credit in the Hanover National Bank; of B. Morison, a partner in the claimants' firm (pp. 32-35); of Henry R. Carse, in August, 1908, the cashier of the Hanover National Bank and now Vice-president of that bank, who was examined at great length as to the debtor and creditor relations of the Hanover National Bank and the firm of A. O. Brown & Co. (pp. 41-67; 85-94); of Ernest Suffern, an expert accountant employed by the Trustee to examine; in the bankrupt firm's books, its account with the Hanover National Bank (pp. 71-82); and of W. T. Shivelle, in August, 1908, the receiving clerk of A. O. Brown & Co., who was examined as to his recollection of the circumstances surrounding the delivery of the said stock by the claimants to A. O. Brown & Co., on Tuesday, August 25, 1908 (pp. 96-122).

The controversy arises on the petition of Morison Brothers, stock Brokers and members of the New York Stock Exchange, praying for an order that the Receiver, or Trustee, pay to them the amount of a check for $17,300, deposited in he Hanover National Bank to the credit of A. O. Brown & Co., the bankrupts, also stock brokers and members of the New York Stock Exchange, on Tuesday, August 25, 1908, it being alleged that the claimants loaned on Tuesday, August 25th, to the bankrupts 100 shares of the capital stock

of the Canadian Pacific Railway Company, a certified check for the value of the stock, or $17,300, to be given immediately upon the delivery of the stock as collatreal security for its return. The petition next alleged the delivery of the stock to the bankrupts, their refusal to give the certified check, or any check, their retention of the stock, and its subsequent conversion by them and its use by them for delivery to another firm of stock brokers, Trippe & Company, whose certified check for $17,300 was received therefor and deposited as stated; the entire transaction being alleged to have taken place while the bankrupts were insolvent and contemplating a general assignment for the benefit of creditors actually
91 executed within two hours after the original delivery of the stock on loan by the claimants.

The answer filed by the Receiver, now the Trustee, denies any knowledge or information as to the allegations of the petition except that it admits the business character of the bankrupts and the formal allegations of the petition in respect to the general assignment, the filing of the petition in bankruptcy, the appointment and qualification of the Receiver, and the adjudication of A. O. Brown & Co. in bankruptcy.

There is no question of the fact that the bankrupts on the morning of Tuesday, August 25, 1908, requested of the claimants a loan of the stock (see the testimony of Percy M. Sneckner, the claimant's bookkeeper, and of Binnie Morison). I have no difficulty in finding that the terms of the contract for the loan of the stock were the delivery by the borrower, immediately upon the delivery of the stock by the lender, of a check for the value of the stock susceptible of immediate certification. Such terms upon the New York Stock Exchange are almost a matter of common knowledge, but in this case they are proven by the testimony of Sneckner, the claimant's bookkeeper, at pages 4 and 10, and of W. T. Shivelle, the bankrupts' receiving clerk (p. 113).

By immediate delivery of such a check, I do not mean that its delivery should be made at the same instant of time as the delivery of the stock lent. I hold as a rule of law that the lapse of a sufficient time for the delivery of the collateral check in the ordinary course of business and with usual expedition, does not convert the transaction between the lender and the borrower of the stock into one of a loan of the stock upon the mere credit of the borrower, where the parties contemplated that the loan should be in exchange for the collateral. There must, in addition, be a manifest intent to extend credit as such to the borrower for a period of time
92 during which the idea of collateral security or claim for collateral security is abandoned. Were the stock in the actual possession of the Receiver or Trustee and reclaimed against him, this would have to be the case, in order to divest the claimants of their title to the stock in favor of the bankrupt firm and place them on the footing of general creditors of the bankrupt firm for the value of the stock as having given credit to that firm for its value. The case does not differ from one of sale and delivery and is governed by the same principle in this regard. Adams v. Roscoe

Lumber Co., 159 N. Y., 180; Empire State Type Foundry Co. v. Grant, 114 N. Y., 40.

Applying this rule, I further find that the occurrences in the office of A. O. Brown & Co. on Tuesday, August 25th, at and after the time when the certificates were handed in by Hugh McIntyre, the claimants' messenger, at the window, did not in any way alter the before mentioned terms of the contract for the loan of the stock, and that on the contrary, on the delivery of the certificates, the claimants were entitled to receive from the firm of A. O. Brown & Co. a check for the value of the stock within such reasonable time as might be convenient for the purpose of the preparation and delivery of the check, or in default of the latter, the return to the claimants of the certificates for the stock.

I further find under Adams v. Roscoe Lumber Co. (supra), as a matter of fact, that by no act did the claimants waive their right to the preparation and delivery of such a check or to the return of the certificates in default thereof. Any such waiver is decisively negatived by the testimony of the partner B. Morison (pp. 33, 34), and indeed an effort was made by Mr. Buchanan, one of the partners in the firm of A. O. Brown & Co., to find the stock for the claimants, and when it was learned that the stock had been delivered to Trippe & Co., to intercept or regain possession of the latter's check for $17,300 deposited in the Hanover National Bank. This
93 was also confirmed by the testimony of Mr. Carse, the then cashier of the Hanover National Bank (p. 92). I particularly call attention to the testimony of Hugh McIntyre, the claimants' messenger (pp. 13-28; 68-69), which should be read in extenso, and which in no important particular is militated against by the testimony of Shivelle, the receiving clerk of A. O. Brown & Co. (pp. 96-122; see particularly, pp. 101, 110, 111, 116, 117), who was behind the delivery window or partition of A. O. Brown & Co. Shivelle behind the partition, it must be remembered, did not see McIntyre, nor did McIntyre see Shivelle or any one else behind the partition. The testimony of McIntyre has every indication of correctly picturing the situation and his actions cannot be construed into a waiver of the claimants' rights in the matter, even if he had any authority to make any such waiver, which I do not think he had, as obviously he was merely the claimants' messenger to make delivery in fact of the stock and to receive delivery of the collateral check in exchange.

On the testimony, I accordingly report that there was a wrongful conversion of the certificates in the forenoon of Tuesday, August 25, 1908, by the firm of A. O. Brown & Co., knowing their inability to prepare and deliver a collateral check to the claimants in exchange for the stock within a reasonable time after the delivery or loan of the stock that morning. Thus far, the controversy presents no feature which I apprehend will be substantially disputed between the claimants and the Trustee. The controversy will turn on the extent of the claimants' rights arising under the subsequent facts, to wit: the delivery of the borrowed certificates to Trippe & Co., the receipt of the latter's check, and its deposit in the Hanover National Bank on

Tuesday, August 25, 1908, and its payment to the Hanover National Bank through the Clearing House at about 10 a. m of Wednesday, August 26, 1908.

94 The established rule of law regarding the following of converted property or its proceeds is well stated In re Cavin v. Gleason, 105 N. Y., 256. The rule is simple and in substance is to the effect that the right to follow such property or its proceeds only ceases when the "means of ascertainment" fail. The difficulty lies in the application of the rule to the particular facts in hand. Each case, in my opinion, must therefore be governed largely by its own facts and the equities they create.

The testimony of Littlejohn (p. 30), the cashier of Trippe & Company, shows that between 11 and 11:30 a. m., or possibly later, on Tuesday, August 25th, the stock before referred to was delivered by the firm of A. O. Brown & Company to Trippe & Co., who immediately gave their check for $17,300 to the messenger of A. O. Brown & Co. The check was drawn upon the Corn Exchange Bank, dated August 25, 1908, payable to the order of A. O. Brown & Company. The original check produced before me (p. 31), was endorsed with a rubber stamp, "Pay to the order of the Hanover National Bank N. Y. City A. O. Brown & Company" and further endorsed with a rubber stamp, "Received payment August 25, 1908 through New York Clearing House Hanover National Bank." The check was also certified by the Corn Exchange Bank payable through the Clearing House. The office of Trippe & Co. was at 25 Broad Street. The office of A. O. Brown & Co., was at 20 Broad Street. The Hanover National Bank is at the corner of Nassau and Pine Streets. There was therefore a certain lapse of time intervening between the delivery of their check by Trippe & Co. and its deposit in the Hanover National Bank. This is the check the return of which, as stated, an effort was made to secure, but which the Hanover National Bank could not return because the general assignment had appeared on the tape (Carse, p. 92). According to Carse (p. 42), the check deposited to the credit of A. O. Brown & Co., on Tuesday,

95 August 25th, was paid to the Hanover National Bank through the Clearing House at 10 a. m., Wednesday morning, August 26th. The deposit slip appears at page 44.

Morison Exhibit 3 (pp. 46-47), is a statement of the account of the Hanover National Bank with the bankrupt firm. It shows the deposits made by the firm and the loans to the firm placed to the credit of its deposit account by the Bank between August 20 and August 25, including on the 25th, the deposit of the $17,300 Trippe & Co. check, as well as the other side of the account down to its final closing out.

The deposit record of A. O. Brown & Co., appearing in the testimony of Suffern (p. 97), shows the Trippe & Co. check $17,300 as the last deposit on Tuesday, August 25th (Suffern p. 73).

Testimony was also given that the deposit of the Trippe & Co. check did not enter into or form the basis of a certification made by the Hanover National Bank drawn by the bankrupt firm to the order of Combs & Co., and which was actually certified early in the

forenoon of Tuesday, certification having been refused the preceding afternoon. Testimony was also given that a loan on collateral had been arranged between A. O. Brown & Co. and the Hanover National Bank to be available on Tuesday morning, and the collateral actually delivered, but that this collateral was never resorted to by the Bank being returned intact to the Receiver, the bank in closing its account with A. O. Brown & Co., resorting instead to the proceeds of the Trippe & Co. check; closing the deposit account by a check to the order of the Receiver for $2,055.97, and closing the loan account by returning to the Receiver intact the collateral referred to, as well as an additional $53,597.66 unused balance of proceeds of collateral sold.

The particulars of the transactions referred to are disclosed in the testimony as follows:

With regard to the certification of the check for $146,600: The testimony of Mr. Carse, the cashier of the Hanover National
96 Bank, shows that the bankrupt firm's balance at the close of business in the Hanover National Bank on Monday, August 24th, was $6,180.17 (p. 54), and that towards the close of business on that day, certification of their check for $146,600, payable to the order of A. H. Combs & Co., had been refused, but that the check was actually certified by the Hanover National Bank very early on Tuesday morning (pp. 49, 50, 85), after a check of A. H. Combs & Co. for $66,000 had been deposited in the bankrupt firm's account. This I have no doubt was the first deposit made on Tuesday (pp. 53, 87-91). The deposits of Tuesday appear on the Hanover National Bank statement (Claimants' Exhibit 3), but not in their order as made (p. 52). I have no hesitation in finding, as a matter of fact, that the certification was made prior to the deposit of the Trippe & Co. check for $17,300, and in reliance on the existing balance in the deposit account after the deposit of A. H. Combs & Co.'s check for $66,000 supplemented by the loan arranged for overnight, as explained below, for which the collateral was in the possession of the bank. The weight of testimony regarding the Trippe & Co. check, as to the time of its delivery by that firm, its presentation for certification to the Corn Exchange Bank fixes the time of its deposit in the Hanover National Bank at a safe interval of time subsequent to the certification of the check for $146,600 for which no doubt the holders were importunate at the earliest possible hour Tuesday morning. I do not refer to the testimony of the accountant Suffern (p. 71), based on the books A. O. Brown & Co., as it does not materially vary from the Hanover National Bank Statement (Claimant's Exhibit 3).

With regard to the loan arranged from the collateral subsequently returned intact by the Hanover National Bank: It appears by the testimony of Mr. Carse that overnight arrangements had
97 been made whereby a loan was to be made to A. O. Brown & Co. on the morning of August 25th (p. 56), upon collateral specified in Claimant's Exhibit 5-e (p. 62); but that before the entries were actually made placing the loan to the credit of the firm's deposit account, the assignment took place. I find none the less that

the loan was actually made to the firm, and, as stated, at or before the certification of the check for $146,600 before mentioned. The collateral was in the actual possession of the bank and was turned over in specie to the Receiver September 5, 1908 (p. 56). A loan of some $25,000 or $30,000 (pp. 85-86) had been figured. I also find on the testimony of Mr. Carse that the collateral mentioned was pledged with the bank and the loan thereon arranged for prior to the deposit of the Trippe & Co. check in controversy.

An examination of Claimant's Exhibit 3, in connection with the testimony of Mr. Carse, also leaves no doubt of the following facts: loans made by the bank to A. O. Brown & Co. were credited in the ordinary banking account of A. O. Brown & Co., of which Exhibit 3 is an itemized statement. In this account, as before stated, the Trippe & Co. check appears. The balance in the account was applied by the bank to the extent of $3,562.24 in reduction of the indebtedness of A. O. Brown & Co. to the Bank on the loans secured by collateral and was subsequently closed by a payment to the Receiver on September 5, 1908, of $2,055.97 (pp. 59-63). The amount of $3,562.24 applied, as stated seems to have been the balance at the close of business August 25th (p. 59). The testimony of Mr. Carse (pp. 62–63), shows that the collateral represented by Claimants' Exhibits Nos. 5-*a*, 5-*b*, and 5*c* was sold out on August 26th, at $441,597.66 and $53,597.66 realized thereon returned to the Receiver, after meeting the balance of the unpaid loans and interest in reduction of which the $3,562.24 had previously been applied, as stated. At the same time, the collateral repre-
98 sented by Claimant's Exhibit 5-*c* pledged as the basis for the loan of $25,000 or $30,000 was returned, as stated, intact to the Receiver.

It can thus be seen and I so find, that the after acquired Trippe & Co. check was, as a matter of business convenience, applied by the bank to liquidate the balance of pre-existing indebtedness on the part of the bankrupt firm to the Bank, whether arising because of checks drawn or because of loans secured by collateral, without resorting to the collateral in its possession represented by Claimants' Exhibit 5-*c*, which was returned untouched by the bank to the Receiver.

Primarily, as between the claimants and the bankrupt firm or their Receiver, in equity I find such balance of indebtedness should have been met by resort, in the first instance, to the firm's own collateral in the possession of the bank, rather than by the application of the proceeds of the Trippe & Co. check to which the firm as against the claimants had no title as being the proceeds of converted property.

Under the clearly defined circumstances, not only showing the deposit of the check contemporaneously with or subsequent to the general assignment executed by the firm, when no new indebtedness was incurred by the firm to the bank, but also clearly establishing the identity and the application of the proceeds of the check and the release to the Receiver by the bank of other assets belonging to

the firm, I am of the opinion that the claimants' equities are beyond question paramount to any equity in favor of the bankrupt firm or its Receiver or its general creditors.

I accordingly report that the claimants are entitled to an order for the payment to them by the Receiver or the Trustee, who has succeeded him, of the sum of $17,300, on payment of the fees of the Special Master and of the stenographer on the present
99 proceeding. It is more equitable that these expenses should fall upon the claimants than upon the general creditors. It was the act of the former in dealing with the bankrupt firm that created the situation the proceeding is brought to remedy, and the former should bear the consequences, good or bad, of their acts, rather than the general creditors.

New York, April 28, 1909.

J. J. TOWNSEND,
Referee in Bankruptcy, Acting as Special Master.

At a Term of the District Court of the United States for the Southern District of New York, in Bankruptcy, Held at Federal Court-House and Post-Office Building, Borough of Manhattan, City of New York, on the 7th Day of June, 1909.

Present: Hon. Charles M. Hough, U. S. Judge.

No. 11277.

In the Matter of ALBERT O. BROWN et al., Bankrupts.

Andrew Morison and Binnie Morison, composing the firm of Morison Brothers, having made their petition to this Court, filed October 26, 1908, praying for an order directing Charles E. Littlefield, Esquire, Receiver and subsequently Trustee, of the above named bankrupts, to pay to the said petitioners, or their
100 attorneys, the sum of $17,300, and the motion for such order coming on to be heard on said 26th day of October, 1908, and on said last mentioned day, said Charles E. Littlefield, Esquire Receiver, and subsequently Trustee, of the above named bankrupts, having filed his answer to said petition, and an order having been made on said day by this Court referring the matter to the Honorable John J. Townsend, Referee in Bankruptcy as Special Master, to take the testimony and report with his opinion thereon to this Court, and the said Special Master having duly taken the proofs offered by the petitioners, Morison Brothers, and by the said Charles E. Littlefield, Esquire, Receiver, and subsequently Trustee, of said Bankrupts, and having duly made, and, on April 29th, 1909, filed his report together with the testimony, and a motion having been made by the petitioners, Morison Brothers, for an order confirming said report and directing the said Charles E. Littlefield, Esquire, Receiver and subsequently Trustee of the said bankrupts, to pay to the said petitioners, Morison Brothers, the sum of $17,300 as aforesaid, and said motion coming on to be heard at a term of this Court held on the 24th day of May, 1909,

Now, on the said petition of the petitioners Morison Brothers, the said answer to said petition of the said Charles E. Littlefield, Esquire, Receiver and subsequently Trustee of said bankrupts, and said order entered thereon, and on the testimony taken before the said Special Master, and on the said Special Master's report, and on the notice of the motion to confirm said report with proof of the due service thereof, and after hearing Holmes V. M. Dennis, Jr., Esquire, of counsel for the petitioners, Morison Brothers, in support of said motion, and Mr. Ralph Wolf of counsel for said Charles E. Littlefield, Esquire, Receiver and subsequently Trustee of said bankrupts, in opposition to said motion, and on motion of Messrs. Dennis & Buhler, attorneys for the said petitioners, Morison Brothers, it is

101

Ordered, adjudged and decreed, that the report of the said Special Master be and the same hereby is in all respects confirmed and that all of the findings of the said Special Master be and the same hereby are made the findings of this Court. And it is further

Ordered, adjudged and decreed, that the said Charles E. Littlefield, Esquire, Receiver, and subsequently Trustee of the said bankrupts, pay to the petitioners Morison Brothers or their attorneys, the sum of $17,300. And it is further

Ordered, adjudged and decreed that the said Charles E. Littlefield, Esquire, Receiver and subsequently Trustee of the said bankrupts, pay to the petitioners, Morison Brothers, or their attorneys, all interest accrued on said sum of $17,300.00 and payable or paid to said Receiver-Trustee, from the 6th day of September, 1908, to the date of payment of said principal sum of $17,300.00.

C. M. HOUGH,
U. S. District Judge.

102

#11277.

In re A. O. Brown & Co.

New York, *February* 24, 1910 — 12 m.

Adjourned Hearing on Claim of Schuyler, Chadwick & Burnham.

Before John J. Townsend, Special Master.

Appearances:

Mr. Ralph Wolf, for the Trustee.
Mr. W. B. Crisp, for the Claimant.

Henry R. Carse, being duly sworn, testified as follows:

Examined by Mr. Crisp:

Mr. Carse, your testimony given in the Morison case has been stipulated into this case, in so far as it is relevant and material. I want to ask you a few questions bearing upon that testimony.

Q. On the morning of August 24th, what collateral did you have of A. O. Brown & Company at the opening of business on that day?

A. At the opening of business on Monday morning, August 24th, I do not believe that we had any collateral at all. No, none.

Q. In the early part of the morning of that day, as I understand your testimony, you made a loan of $200,000 to A. O. Brown & Company?

A. That was a loan made on the plain note of the firm, without any collateral.

SPECIAL MASTER:

Q. And what was done with the $200,000, was it placed in their deposit account?

A. Yes; credited in their account.

103 Mr. CRISP:

Q. Is that loan shown in the statement which you have in your hand?

A. Yes, sir.

Mr. CRISP: I offer that statement in evidence.

Statement received and marked Exhibit 1 of this date.

Q. Did you have a loan agreement with them, at that time?

A. Yes, sir.

Q. Look at the paper which I hand you (handing witness paper), and see if that is a copy of the agreement?

A. Yes, sir.

Mr. CRISP: I offer the copy of the agreement in evidence.

Received and marked Exhibit 2 of this date.

Q. I understand you to say that you received no collateral for the $200,000, at all?

A. No, sir.

Q. Did you make any other loan on that date, August 24th?

A. Yes, sir; we made a loan during the morning of $85,000. and one of $80,000., both at the same time.

SPECIAL MASTER:

Q. Why do you speak of it as two loans: $85,000. and $80,000; and not $165,000. Were they two different transactions?

A. Yes, sir; one of $80,000. was made against 500 shares of Great Northern Preferred, 200 shares of New York Central, and 110 shares of Amalgamated Copper; while the other loan of $85,000. was made against some Tobacco Bonds, I haven't the detail here. That was probably the reason they were made separately.

104 Mr. CRISP:

Q. Did you know what those Tobacco Bonds were?

A. They were some 6's and some 4's, I believe.

Q. Of what value, do you remember?

A. Of more than sufficient value to cover the loan. I haven't the data here.

Q. Can you give it to the Referee, at some time?

A. Yes, sir.

Q. Will you look at the paper which I now show you, which is a copy of Exhibit 5-B in the Morison case, and state whether or not that represents the loan and the collateral which was received with it?

A. For the $80,000. loan; yes, sir.

Mr. CRISP: I offer the copy of Exhibit 5-B in the Morison case in evidence.

Received and marked Exhibit 3 of this date.

Examination continued by Mr. CRISP:

Q. What collateral did you receive with the fifty thousand loan that you made?

A. Somebody from Brown's office called up during the day and asked if they could make a substitution of these tobacco bonds, and I said all right, and they called up later and said that they would make a new loan for $50,000, and I said all right, and they sent up a check. They paid off the $85,000 loan and they got a new loan of $50,000 on five hundred Great Northern preferred.

Q. Look at the paper which I now show you and see if that is the loan slip for the $50,000 and collateral which went with it?

A. That is a copy of the loan slip.

Mr. CRISP: I offer it in evidence.

Same received and marked Exhibit number "4" of February 24th, 1910 (the paper was previously marked in the Morison case as 5-A).

105 Q. On August 25th you made a loan of $250,000 to A. O. Brown & Company, didn't you?

A. Yes, sir.

Q. What collateral did you receive with it?

A. We received one thousand shares of United States Steel common and three thousand shares of Amalgamated Copper.

Q. Is the paper I now show you, which was Exhibit 5-C in the Morison case a copy of both slips and collateral which was deposited with that loan?

A. Yes, sir.

Mr. CRISP: I offer the paper in evidence.

The REFEREE: What day was this loan made, or rather what time of the day.

The WITNESS: Early in the day, about twelve o'clock.

The paper was received and marked Trustee's Exhibit "5" of February 24th, 1910.

Q. Who made the actual transaction for the bank?

A. I did.

Q. Who was the actual member of the firm you dealt with?

A. Mr. Buchanan.
Q. Did he come to see you?
A. He did come to see us.
Q. Didn't you on the same day make another loan of $8,000 to A. O. Brown & Company?
A. We did.
Q. What collateral did you receive for that?
A. One hundred shares of Southern Pacific, common stock. It was placed in transfer.
Q. By whom?
A. By A. O. Brown & Company.
Q. Before it got to you?
A. Yes sir, we got the transfer receipt.
Q. What time was that?
A. It was quite early.
Q. Was that before or after the $250,000 loan?
A. It was about the same time; I cannot say absolutely; about 10 a. m.

106 Q. Look at the paper I now show you, being marked Exhibit 5-C in the Morison case, and I ask if that is a copy of the loan slip and the collateral referred to?
A. It is.

Mr. CRISP: I offer it in evicence.

Same received and marked Trustee's Exhibit "6 of February 24th, 1910.

Q. On August 24th the arrangement was made for a loan of between $25,000 and $30,000, as I understand your testimony, do you recall that, on Monday?
A. It was on the 25th.
Q. Such collateral was deposited by you?
A. Yes sir, for that purpose.
Q. Does the slip I now hand you show the collateral deposited with you on that date?
A. Yes sir.
Q. About what time of the day on Monday the 25th did you make arrangements for the loan of $25,000?
A. I think from my testimony that I have not been very clear as to the time. I am somewhat uncertain as to the exact hour.
Q. It was before you heard of the assignment?
A. Yes, sir, a considerable time before that.
Q. What was done with the loan of $250,000, which you made early on the morning of the 25th of August, when was that paid off?
A. Paid off between two and three o'clock, by their giving us their check on ourselves.
Q. What date?
A. Monday, August 24th.
Q. You have explained the $85,000 loan already. That was taken up by the substitution of the $50,000 loan and collateral attached to it?
A. No, by being paid with a check.

Q. A check on your bank?
A. Yes, on ourselves.
Q. Then the $50,000 loan was made as you have testified?
A. Yes sir.
Q. What was done about the $80,000 loan which was made on the 24th, what became of that?
107 A. That remained with us until the collateral was sold on August 25th, and the proceeds were used to pay the amount due on the loan and the interest and the balance was included in the check which was paid to the Receiver on September 5th, 1908. The same is true with reference to the $50,000 loan, and also in regard to the $60,000 loan, but the $8,000 loan, some one had got that certificate in transfer, and they refused to deliver it to us.
Q. The transfer agent refused?
A. Yes sir, so that we delivered the transfer receipts to the Receiver on September 5th.
Q. You paid off the $8,000,—where did you get the money to pay that off?
A. From the proceeds of the other collateral.
Q. Will you look at the statement marked Exhibit number "1" of this date, and I call your attention specifically to a deposit of $23,000 thereon on the 25th day of August,—can you tell whose check that was that was so deposited?
A. There is the original slip of A. O. Brown which is dated August 24th.
Q. What date was it actually deposited?
A. The account in the ledger indicates it was deposited on the 25th.
Q. Whose check was it?
A. The only information I had was that it was a check drawn on the Mechanic's National Bank.
Q. Do you know by whom?
A. No sir.
Q. Is that the only $23,000 you received on that date, on the 24th or 25th of August?
A. From A. O. Brown & Company, yes sir.
Q. I call your attention again to the statement, and to two checks deposited, two deposits of $266,600 each on the 25th of August. Will you kindly state whose they were?
A. One check was drawn on the National Bank of Commerce, and the other was drawn on the Phœnix National Bank.
108 Q. Are those the only deposits of those amounts on the 24th?
A. Yes sir.
Q. Do you know whose check that was that was drawn on the Phœnix National Bank?
A. No sir.

Cross-examination by Mr. WOLF:

Q. What was the bank balance credited A. O. Brown & Company on the morning of the 24th of August?

A. $130,867.60.

Q. What were the deposits and withdrawals on that date, the gross deposits on the 24th, that is the additional deposits?

A. $3,743,526.20.

Q. What were the drafts?

A. $3,874,393.36.

Q. The drafts actually charged on the 24th?

A. $3,868,213.19.

Q. That left a balance at the close of business to open up with on Tuesday morning how much?

A. $6,108.17.

Mr. CRISP: I object to this line of examination as immaterial and irrelevant.

The MASTER: Objection overruled.

Mr. CRISP: Exception.

Q. What are the deposits on the 25th of August?

A. $145,187.07.

Q. Making a total of how much?

A. $151,367.24.

Q. What were the withdrawals on the 25th of August?

Mr. CRISP: I make the same objection to all this line of examination, as irrelevant and immaterial.

The MASTER: I overrule the objection.

Mr. CRISP: Exception.

A. We paid $146,600 in one check, one of $705, and we charged to the account the exchange on items due us of $4.27; also an item on New London, which they had deposited with us, and which was returned to us unpaid, of $1,500, and the protest fee
109 of $2.00, and that left a balance of $2,055.97, for which we gave a check to the Receiver on September 5th,—there is also a check of $500 on the Mechanic's Bank, payment on which was stopped by them.

Q. How early in the day was the check for $146,600 paid, or certified?

A. My recollection of the time is somewhat uncertain.

By Mr. CRISP:

Q. The items of $500, $1,500, and $2.00, were at what time in the day charged back?

A. The item of $500 was charged back sometime on August 25th. It must have been by three o'clock, or else the other bank would not have had the right to return it to us.

Q. Probably not before twelve o'clock of that day?

A. No, it was probably after the failure. The item of $1,500 came back to us the following day, August 26th.

Q. You charged that back August 26th?

A. Yes, sir.

Q. These are the only items outside of the $146,600 referred to by you?

A. No, there was one check for $705, that was paid early on the morning of August 25th; it was either certified or paid in cash by our paying teller.

Mr. WOLF: I want to place in evidence the Master's report in re Morison, and the order of the District Court thereon, and the order of the Circuit Court of Appeal-, and I also would like to testify that the Trustee herein has complied with those orders.

Mr. CRISP: I object to this as irrelevant and immaterial.

The MASTER: Objection overruled.

Mr. CRISP: Exception.

[Hearing closed.]

110 SCHUYLER EXHIBIT 2.

To deliver Aug. 24, 1908.

2522

Folio	To whom sold	No. of Shares	Description	Price	Amount	Commissions	Interest	Stamps	Total amount	For whose account	Numbers
..	A. O. Brown & Co..	100	Ice	..	...	....	....	....	630	Stamps	62561
..	" ..	1000	Smelt	..	...	....	....	....		S L	62499
..	" ..	200	Un. Pac.	..	128300	....	....	....	142400		181770
..	" ..	300	Int. Met. pfd.	..	...	....	....	...	(10359432)		181871
											8386/7
											8245

111 SCHUYLER EXHIBIT 3.

(Copy.)

Miller & Company.

To Receive. Aug. 24/1908.

[260300]*

Of whom bought	No. of Shares	Description	Price	Interest	Loans or amount	Amount or commissions	Total amount	For whose account	Numbers	Folio
A. O. Brown & Co..	1900	Gen. R. pr.	137	..	Off 23,000 for margin	114000	..	C. H. Del'd	1000 B	..
d ..	2800	A. R.	93	..	.....	[260400]*	..	d	....	..
d ..	100	K. T.	31	..	.....	[3100]*	..	d	....	..
									39766—	..
d ..	1000	No. Pac	143	..	.....	143000	..	d	39360	..
						9600	..	300	8386	..
d ..	1400	I. B. pr	32	..	F 1100	[44800]*	..	d	8387	..

d	..	600	Pa.	124	..	.....	[37200]*..	d	8245	..
d	..	100	Mop.	55	..	.....	[5500]*..	d		..
d	..	300	L. & N.	108	..	.....	[32400]*..	d		..

[* Figures enclosed in brackets erased in copy.]

A. O. Brown

112

[On Back.]

(Copy.)

Miller & Company.

To Deliver.

Aug. 24, 1908.

To whom sold	No. of shares	Description	Price	Interest	Loans or amount	Amount or commissions	Total amount	For whose account	Numbers	Folio
		Margin on stk. failed					23000	A. O. Brown Co.		

(Here follows paster, marked page 112*a*.)

113 EXHIBIT 2 OF FEB. 24, 1910.

Know all men by these presents, That the undersigned, in consideration of financial accommodations given, or to be given, or continued to the undersigned by The Hanover National Bank of the City of New York, hereby agree with the said Bank that whenever the undersigned shall become or remain, directly or contingently, indebted or liable to the said Bank for money lent, or for money paid for the use or account of the undersigned, or for any overdraft or upon any endorsement, draft, guarantee or any other claim, or in any other manner whatsoever, the said Bank shall then and there have the following rights, in addition to those created by the circumstances from which such indebtedness or liability may arise against the undersigned, or his, its, or their executors, administrators, assigns or successors, namely:

1. All securities and property then or thereafter deposited by the undersigned with said Bank, as collateral security to any such indebtedness or liability of the undersigned to said Bank, shall also be held by said Bank as security for any other indebtedness or liability of the undersigned to said Bank, whether then existing or thereafter contracted; and said Bank shall also have a lien upon any balance of the deposit account of the undersigned with said Bank existing from time to time, and upon all property of the undersigned of every description theretofore or thereafter left with said Bank for safekeeping or otherwise, or coming into the possession or under the control of said Bank in any way, as security for any indebtedness or liability of the undersigned to said Bank now existing or hereafter contracted.

2. Said Bank shall at all times have the right to require from the undersigned that there shall be lodged with said Bank as
114 collateral security for all existing liabilities of the undersigned to said Bank, approved securities to an amount satisfactory to said Bank, and upon the failure of the undersigned to keep with said Bank at all times, a margin of securities for such liabilities of the undersigned, satisfactory to said Bank, or at any time to comply immediately with the demand of the said Bank for additional approved security, as collateral, or upon any failure to pay on demand any indebtedness or liability due on demand to said Bank, or upon failure to meet any business obligation, or upon any assignment for the benefit of creditors, or act of bankruptcy, whether voluntary or involuntary, by the undersigned, then and in either event all liabilities of the undersigned to said Bank shall, at the option of the said Bank become immediately due and payable, notwithstanding any credit or time allowed to the undersigned by any instrument evidencing any of the said liabilities.

It is expressly agreed that a request in writing delivered at 30 Broad Street, New York, or deposited in the Post Office or in any drop-letter box within the City of New York regularly maintained by the United States Government, enclosed in a post-paid wrapper directed to the undersigned at said address, or delivered to any

Telegraph Company at its office in the vicinity of said Bank in the Borough of Manhattan, New York City, for transmission by telegraph, to the undersigned at said address, shall be a sufficient demand for additional security or for payment of any indebtedness or liability due on demand to said Bank.

3. Upon failure of the undersigned either to pay any indebtedness to said Bank when becoming or made due, or to keep up the margin of collateral securities, as above provided, then and in either event said Bank may immediately, without advertisement, and without notice to the undersigned, sell any of the securities or property held by it as against any or all of the indebtedness or
115 liabilities of the undersigned, at private sale or Broker's Board or otherwise, or may, without notice, discount, collect, compound, compromise, settle, manage and turn the same into cash according to opportunity, at the discretion of any of the officers of said Bank, and apply the proceeds thereof as far as needed toward the payment of any or all of such indebtedness or liabilities together with interest and all expenses (legal or otherwise) of sale or collection, holding the undersigned responsible for any deficiency remaining unpaid after such application. If any such sale be at Broker's Board or at public Auction, said Bank may itself be a purchaser at such sale free from any right or equity of redemption of the undersigned, such right and equity being hereby expressly waived and released. Upon default as aforesaid said Bank may also apply toward the payment of the said indebtedness or liabilities all balances of any deposit account of the undersigned with said Bank then existing.

It is further agreed that these presents constitute a continuing agreement, applying to any and all future, as well as to existing transactions between the undersigned and said Bank.

Dated, New York, the 8th day of January 1907.

A. O. BROWN & CO.

116 United States District Court for the Southern District of New York.

No. 11277.

In the Matter of A. O. Brown & Co., Bankrupts.

In the Matter of the Claims against the So-called Hanover National Bank Fund.

Sirs: Please take notice that upon the report of John J. Townsend, Esq., Referee herein, to whom this proceeding was duly referred as Special Master for hearing, testimony and report, upon the testimony and exhibits herein, and upon all the papers referred to in the said report, we shall bring said report on for hearing at a Stated Term of this Court appointed to be held in the Court Rooms thereof, in the General Postoffice Building, Borough of Manhattan, City of New York, on the 12th day of December, 1910, at 10:30

o'clock in the forenoon, or as soon *as* thereafter as counsel
117 can be heard, for an order thereon, and for such other and further relief as to the Court may seem just and proper.

Yours, &c.,

HAYS, HERSHFIELD & WOLF,
Attorneys for Trustee.

Office & Post Office Address, 115 Broadway, Borough of Manhattan, New York City.

To Schuyler, Chadwick & Burnham, and W. Benton Crisp, Esq., their attorney, 20 Broad Street, New York City; First National Bank of Princeton, Illinois; William H. Simpson, Fred J. Bullen, Edgar Perkins, Samuel C. Scotten, Scotten & Snydacker, and Thorndike Saunders, Esq., their and each of their attorney, 27 William Street, New York City; Martha Leland, and George M. Burditt, Esq., *his* attorney, 31 Nassau Street, New York City; Ernest T. Fellows and Henrietta C. Schroeder-Burley; House, Grossman & Vorhaus, Esqrs., their attorney, 115 Broadway, New York City; Bessie H. Parker, and Stetson, Jennings & Russell, Esqrs., her attorney-, 15 Broad Street, New York City; Thomas E. Conklin, and Carroll Berry, Esq., his attorney, 180 Broadway, New York City.

(Endorsed:) Notice of hearing.

118 United States District Court, Southern District of New York.

Re A. O. Brown & Company.

The Fund on Deposit with the Hanover National Bank.

Hand, *District Judge:*

The distribution of this fund involves a great many different controversies which must be considered separately. I will take them up in the same order as the Master.

Ex Parte Schuyler, Chadwick and Burnham.

The facts are stated in the referee's report very fully. I concur with him in finding that the stocks were procured by fraud and that therefore the claimants had the right to rescind their contract and follow the stock or its proceeds. I do not concur with the Master in finding that the proceeds of the stock were contained in the cheque for $23,000 if by that he means that there is any evidence that Miller & Co. supposed they were paying for that stock with that cheque. I think there is no evidence from which it can be determined what was the intent of Miller & Co. in that respect. There is no evidence that the cheque for $266,600 was paid to the bankrupts before the Interborough stock was delivered. That stock at the latest was delivered at two o'clock and there is no means of placing the time of delivery of the first cheque before three P. M.

If the first cheque was delivered before the stock, the Master says that the final $600 may be accounted for by the fact that the
119 price of the Interborough stock was already known, but it is not the custom to pay for any part of stock which has not been delivered. There is no evidence of the time at which the 1,000 shares of Great Northern, or the 1,000 shares of Northern Pacific, stock were delivered. If it be assumed that they and the first cheque were delivered before the Interborough stock it would have been an extraordinary thing that the payments made on account of those 2,000 shares of stock should have been in the sum of $600 when the purchase price of neither answered that figure. Any conclusion seems to me necessarily too speculative to be the basis of a decision involving property rights, though if I were forced to such a speculation I should conclude from the amount of the cheque that all stock deliveries had been made before any cheque was issued. However, I do not think it necessary to decide that question, because there being no evidence which favors the claimants' construction, it must be taken against him, he having the burden to establish it. I shall therefore assume that all three deliveries of stock preceded that of the first cheque. The obligation of Miller & Co. to pay for all this stock was similar to the obligation of a banker to pay deposits which have been made by him, and the case is analogous to those cases in which a trustee mingles in a bank account funds of his own and funds of his beneficiary. The rules affecting withdrawals from such an account I have tried to state in an opinion recently handed down on January 23, 1911, in the suit in the Circuit Court of Primeau v. Granfield, to which I refer for my reasons, and which I shall here only shortly recapitulate. In such cases the rule does not obtain which commonly obtains between debtor and creditor, that is, that the earliest payments are to be attributed to the earliest debits, U. S. v. Kirkpatrick, 11 Wheat. 720. On the contrary in cases where the rights of the beneficiary demand it, that rule is abandoned. The case is regarded in this way; all the deposits taken together consti-
120 tute an obligation of the banker's, a single chose-in-action, amounting in total to the sum of the deposits. Upon that chose-in-action the beneficiary has a lien, if he wishes to assert it, equal to the sum of money which his property has contributed to it. So in this case the claimants may elect to retain a lien upon the total deposit after the first withdrawal. This is the effect of the case of Knatchbull v. Hallett, L. R. 13 Ch. 696, a case which has been very frequently cited and the decision of which has been followed many times. This is sometimes stated as a presumption of the trustee's intent, but that is a fiction.

The result of this is that, had the failure occurred before Miller & Co. had paid the second cheque, the claimant would have been allowed by a court of equity to assert his lien against the sum of $23,000.

However, that sum of $23,000 instead of being represented by a chose-in-action in which the bankrupts were obligees and Miller & Co. were obligors, was represented by a cheque for $23,000 which

had been paid in discharge of that chose-in-action and which was in every sense the proceeds of it. The claimants therefore had, at their election, a lien upon that cheque precisely similar to the lien which they had upon the chose-in-action, and that lien remained after the bankrupts had deposited it with the Hanover National Bank. The trustee concedes that if once the claimants establish a lien upon that deposit they are entitled to be subrogated to the note held by the bank, which was paid with the deposit, and which was itself secured by certain collateral, which or whose proceeds afterwards came to the hands of the trustee.

Therefore, although I do not agree with the facts upon which the result was reached, I do think that the result was correct.

There remains to be considered whether the intent of Miller & Co. and the bankrupts was so clear to pay for the Interborough stock by the first cheque that the proceeds of the stock could only
121 have been in the first cheque. That is not clear. As I have already said, the Interborough stock was probably delivered before the first cheque was issued, but it does not follow from that that the first cheque was intended particularly to include that stock. The assistant cashier of Miller & Co. either would not, or could not, state what was the reason for making payment by two cheques, and the more natural reason is that there was something in the accounts of the parties which justified the inference that there might be a set-off which required that much at the outside. The retention of that sum of money, for whatever reason it may have been done, would not normally, however, be attributed to any particular one of the three items together creating the obligation. They would be probably regarded as together making one obligation, like deposits in a bank, as I have suggested. Here again the inquiry is necessarily speculative, but in this case the trustee must establish that the first cheque was intended to include the whole of the stock, and he cannot do it. Instead of that, if there be any conclusion, it must be that Miller & Co. had no specific intention at all, but paid the cheque generally on their obligation. If their intention was undifferentiated then there is ground to apply the rule which I have already indicated. The report as to Schuyler, Chadwick and Burnham is therefore confirmed.

L. H., *U. S. D. J.*

122 In the United States District Court for the Southern District of New York.

In the Matter of A. O. Brown & Co., Bankrupts.

In the Matter of the Claim Against the So-called Hanover National Bank Fund.

A motion having been made herein for an order upon the report of John J. Townsend, Esq., Referee herein, to whom this proceeding was duly referred as Special Master for hearing, testimony and report, and said motion having regularly come on to be heard,

On reading and filing notice of motion herein, and proof of due service thereof, the report of said Special Master, and the testimony and exhibits herein including the stipulation between the attorneys for the Trustee and the attorneys for Bessie H. Parker, dated March 17th, 1911, and upon all the papers referred to in the said report, and after hearing counsel for the Trustee and claimants herein it is

Ordered that the said report of the said Special Master be and the same hereby is, except as hereinafter specifically ordered, in all respects confirmed, and the said findings and recommenda-
123 tions of the said Special Master, except as hereinafter ordered be and they hereby are adopted and approved and made the recommendations and findings of this Court; and it is further

Ordered that the Trustee herein first pay out of the said fund the Special Master's fees and the fees of the stenographer herein; and it is further

Ordered that the Trustee herein pay to Schuyler, Chadwick & Burnham, or their attorney W. Benton Crisp, Esq., $9,600, being the proceeds of the sale of claimant's stock, with interest on that sum at the same rate, if any, received by the Trustee thereon, docket fees and disbursements to be taxed; and it is further

Ordered that the motion herein to confirm the said report of the Special Master in so far as it recommends the dismissal of the claim in reclamation of Bessie H. Parker (No. 1) be, and the same hereby is denied and the said report in that respect is hereby overruled, set aside, and held for naught; and it is further

Ordered that the Trustee herein assign, transfer and deliver to the said petitioner Bessie H. Parker, or her attorneys, Stetson, Jennings & Russell, a certain certificate for 100 shares of the stock of the Southern Pacific Company standing in the name of Charles E. Littlefield, Receiver, and now in his possession as Trustee, and held by him subject to the order of the Court in this proceeding, and do all things necessary to transfer, assign and set over all the right, title and interest which the said Trustee has or may have in and to the said certificate of stock to the said Bessie H. Parker, or her said attorneys, together with the docket fee and her disbursements to be taxed; and it is further

Ordered that the said Trustee may, at his option deliver
124 and pay over to said Bessie H. Parker, or her attorneys, Stetson, Jennings & Russell, the sum of $9,912.50 together with interest on that sum at the same rate, if any, as received by the Trustee thereon, in lieu of the delivery by him of the said certificate of stock of the Southern Pacific Company as hereinabove directed; and it is further

Ordered that the Trustee herein deliver to Edgar Perkins or his attorney Thorndike Saunders, Esq., 25 shares of the Nevada Utah stock, or their proceeds without prejudice to the claimant's rights to prove as a general creditor for the credit balance in his favor; and it is further

Ordered that the claims in reclamation of First National Bank of Princeton, Illinois, William H. Simpson; Fred J. Bullen; Samuel

C. Scotten; Scotten & Snydacker; Martha Leland; Ernest T. Fellows; Henrietta C. Schroeder-Burley; Thomas E. Conklin and Bessie H. Parker (No. 2) filed in the office of the Clerk of this Court, be and the same hereby are dismissed without costs to either party as against the other, and it is further

Ordered that the foregoing shall be without prejudice to the rights of the said claimants, and each of them, to file within 10 days from the entry hereof a proof of claim with the Referee as general creditors for the amount due him or them herein; and it is further

Ordered that each and all of the above named claimants, and each and every other individual, firm and corporation be and they hereby are, and each of them hereby is enjoined and foreclosed from making, asserting, or prosecuting, in law or in equity, any claim to the cash, stocks, bonds and securities, the subject of this proceeding; and it is further

Ordered that after the payments aforesaid the residue and
125 remainder of the funds, the subject of this proceeding, be paid by the Trustee to himself for the benefit of the general estate herein.

Dated, New York, April 20th, 1911.

LEARNED HAND, *D. J.*

(Endorsed:) Order filed April 20, 1911.

Citation.

United States District Court, Southern District of New York.

In the Matter of A. O. Brown & Co., Bankrupts.

In the Matter of the Claims Against the So-called Hanover National Bank Fund.

The President of the United States of America to Schuyler, Chadwick & Burnham and Bessie H. Parker, or Their Attorneys Herein, W. Benton Crisp and Stetson, Jennings & Russell, respectively:

You are hereby cited to appear in the United States Circuit
126 Court of Appeals for the Second Circuit, to be held at the City and County of New York in the United States Court Rooms therein, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the United States District Court for the Southern District of New York, to show cause, if any there be, why the errors mentioned in said appeal should not be corrected, and speedy justice should not be given to the parties in that behalf.

Witness, Hon. Learned Hand, Judge of the United States District Court, Southern District of New York, the 10th day of July, 1911.

LEARNED HAND,
United States District Judge.

(Endorsed:) Citation filed July 10, 1911.

127 *Petition of Appeal.*

United States District Court, Southern District of New York.

In the Matter of A. O. BROWN & Co., Bankrupts.

In the Matter of the Claims Against the So-called HANOVER NATIONAL BANK FUND.

Charles E. Littlefield, as Trustee in Bankruptcy herein, conceiving himself aggrieved by the order entered herein on April 20, 1911, in the office of the Clerk of the District Court of the United States for the Southern District of New York, in so far as said order directs the Trustee herein to pay to Schuyler, Chadwick & Burnham, or their attorney, W. Benton Crisp, Esq., $9,600, with interest, and in so far as said order directs the Trustee herein to transfer and deliver to Bessie H. Parker, or her attorneys, Stetson, Jennings & Russell, Esqs., a certain certificate for 100 shares of stock of the Southern Pacific Company, or permit said Trustee, at his option, to
128 deliver to said Bessie H. Parker, or her said attorneys, the sum of $9,912.50, together with interest thereon, and by the errors set forth in his assignment of errors herewith filed, does hereby pray for an order granting leave to appeal.

And that a transcript of the records, proceedings and papers upon which said orders were made and entered, or such parts of them as are pertinent to the said errors be duly made, authenticated and sent to the Circuit Court of Appeals for the Second Circuit.

Dated, New York, July 10th, 1911.

HAYS, HERSHFIELD & WOLF,
Solicitors for Petitioner-Appellant.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, New York City.

On this 10th day of July, 1911, it is ordered that the Appeal be allowed, as above prayed.

LEARNED HAND,
United States District Judge.

(Endorsed:) Petition of appeal and order allowing appeal filed July 10, 1911.

129 *Assignment of Errors on Appeal.*

United States District Court, Southern District of New York.

In the Matter of A. O. Brown & Co., Bankrupts.

In the Matter of the Claims Against the So-called Hanover National Bank Fund.

Now comes Charles E. Littlefield, as Trustee in Bankruptcy herein, by Hays, Hershfield & Wolf, his attorneys, and alleges that the order entered herein on April 20, 1911, with respect to the Trustee herein, is erroneous and against the rights of said Trustee, in matters following:

1. In ordering that the Receiver or Trustee herein pay to Schuyler, Chadwick & Burnham, or their attorney, W. Benton Crisp, Esq., $9,600.

2. In deciding that Schuyler, Chadwick & Burnham had a lien or claim upon the assets, property and effects received by the Receiver or Trustee herein from the Hanover National Bank.

130 3. In deciding that said Schuyler, Chadwick & Burnham proved that the proceedings of the said claim in stock constituted any part or portion of said assets, property and effects received by the Receiver or Trustee herein from the Hanover National Bank.

4. In deciding that said claimants' funds were traced into or connected with the assets, property and effects delivered by said Hanover National Bank to the Receiver or Trustee herein.

5. In omitting to decide that the claim of Schuyler, Chadwick & Burnham should be dismissed.

Dated, New York, July 10th, 1911.

HAYS, HERSHFIELD & WOLF,
Solicitors for Charles E. Littlefield, as Trustee in Bankruptcy of A. O. Brown & Co.

Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, New York City.

(Endorsed:) Assignment of Errors filed July 10, 1911.

131 United States of America,
Southern District of New York, ss:

In the Matter of A. O. Brown & Co., Bankrupts.

In re Claim of Schuyler, Chadwick & Burnham, a Creditor.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby

Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 25th day of November in the year of our Lord one thousand nine hundred and eleven and of the Independence of the said United States the one hundred and thirty-sixth.

[SEAL.] THOMAS ALEXANDER, *Clerk.*

132 United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 162.

Argued December 9, 1911; Decided January 8, 1912.

In the Matter of A. O. BROWN & COMPANY, Bankrupts; CHARLES E. LITTLEFIELD, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Ward, Circuit Judges.

This cause comes here on petition to revise an order of the District Court, Southern District of New York, directing the trustee in bankruptcy to pay $9,600 to the appellees, a firm which filed a claim in reclamation against certain funds and credits of the bankrupts which came into possession of the receiver. The appellees will be hereinafter referred to as Schuyler & Co.

LACOMBE, *C. J.:*

The transactions upon which it is sought to establish a lien favor of Schuyler & Co. are many of them set forth in our opinion In re Brown & Co. Petition of Princeton Bank filed herewith. Reference may be had to that opinion, as we shall not restate them all here.

On August 24th, 1905, Brown & Co. asked Schuyler & Co. to loan them 300 shares of Interborough Railway stock, apparently to enable them to make deliveries, and agreed to secure the latter by paying the market price $9,600 for the same. They gave a check for the $9,600 on the Hanover Bank which was presented on the
133 24th and again on the 25th, payment and certification refused; Brown & Co. made an assignment for the benefit of creditors about noon on the 25th. The stock was turned over to them on the 24th. It is unnecessary to discuss the circumstances which show that their stock was converted by Brown & Co. since it is conceded by every one that it was so converted, was sold by them and that its proceeds became trust money, in their hands, belonging

to Schuyler & Co. The only thing to be considered is the attempt which has been made to trace these funds. Brown & Co. sold and delivered to Miller & Co., another firm of stock-brokers 1000 shares of Northern Pacific, 1000 shares Great Northern and these same 300 shares of Interborough. The total price was $289,600 and on the 24th Miller & Co. delivered two checks therefor to Brown & Co., for $266,600 and $23,000 respectively. The first of these checks was received by bankrupts before 3 P. M. in time to deposit the same with the Hanover Bank on that day; the other was not received until 3.30 or 4 P. M. of that day. It was listed on a deposit slip dated August 24th, but apparently came too late for deposit until the next day. The first question presented is whether claimant's trust fund ($9,600) was in the larger or in the smaller of these two checks. The Special Master found that it was included in the $23,000 check, "as a reasonable inference from the testimony." According to his statement of the testimony the 300 shares of Interborough were delivered by the claimant to the bankrupts "well on in the afternoon of Monday the 24th." If this were so the inference would be a reasonable one; but the evidence of the bookkeeper shows that delivery of the loaned stock was made between 1.30 and 2 P. M., which was in ample time to make delivery to Miller & Co., and there is no other testimony as to the hour. We are by no means satisfied that the $9,600 was included in the smaller check. But it is not necessary to decide this question. The record is very scrappy and possibly some of the original exhibits, which are not before us may contain enough to support the Master's finding. It makes no difference in the final analysis in which of these two checks the claimants' $9,600 was included.

The history of the check for $23,000 may be first considered. It was, as we have seen, received between 3.30 and 4 P. M. August 24th, was entered on a deposit slip of that date, but could not be
134 deposited in time; it went in sometime the next day. According to the excerpt from the bank books, showing checking account, which will be found set out in our opinion (filed today) in the Princeton Bank claim, it was the first deposit made on the 25th. The testimony shows, however, that entries of deposits and charges did not always get into the books in the order of the actual transaction. It is the theory of the claimant that this $23,000 was not deposited until after the large check to A. H. Combs & Co. ($146,600) had been certified, it being contended that for that reason the proceeds of claimant's stock, which it is claimed were included in the $23,000 check were not dissipated by the certification. To maintain this theory it is necessary for the claimant to show by competent proof which event occurred first, the certification or the deposit.

As to the certification there is the evidence of the man, H. B. Combs, who obtained the certification and deposited the certified check in the Bank of Commerce. He gives a narrative of the occurrences which preceded the certification and, which naturally took some time, and states quite positively that he made the de-

posit in the Bank of Commerce probably at twenty minutes of twelve on his way to lunch. The testimony of the vice-president of the Hanover Bank is as follows. He first said it was certified very *c*learly in the morning; that it was presented by Combs on August 24th and was held over till the next day until the account was made good. Being shown the lists of deposits as given in books of the bank and asked after which deposit it was that he authorized the certification he replied "after the deposit of the $66,000," "immediately after the deposit." He said there was no record which would show them the $66,600 was deposited, that according to his recollection it was the first deposit, might have been 10 A. M. or earlier. Later on he said he could not be positive as to the time within an hour and being asked as to whether a check for $17,300 figured among those which made the account good for $146,600, he said if it came in after 11 A. M. it would not have been included in his figuring; if it came in before that date he would not swear it did not so figure. This would bring the time of certification down to about 11 A. M. which accords with Comb's testimony. The vice-president's recollections of the dates of
135 these transactions he admitted was "somewhat uncertain."

Elsewhere he testified that about 10 A. M. of August 25th he made a loan of $250,000 to the bankrupts on a 1,000 U. S. Common and 3,000 shares Amalgamated Copper, which was paid off by bankrupt's check on Hanover Bank later in the day. But the books disclose no such check and the loan slip shows that this note of $250,000 was in fact paid August 27th through sale of the collateral. There is certainly no very satisfactory proof as to when the check for $146,600 was actually certified, although it is clearly established that it was not till the Combs check for $66,600 and others had been deposited and the account made good. Claimant calls attention to the general lien of the bank on all balances and all surpluses of collateral, arguing that there was no necessity to wait for further deposits after opening of business on the 25th, since the bank's officers could safely and lawfully certify to the amount of $146,600. But the material circumstances is not what they could have done, but what they did do; and if anything is proved in this case it is the fact that the large check was not certified until the deposit of $66,600 was made, and also such other deposits as came in before it.

In order to establish the relative priorities of the certification and of the deposit of the $23,000 check it is necessary to show the time when both transactions took place. But as to the deposit there is no testimony whatever. In view of the circumstance that the deposit slip was prepared in the afternoon of the 24th, and that the condition of Brown & Co. was such as to call for the prompt deposit of everything they could control, it might fairly be inferred that the $23,000 would be deposited on the 25th, as soon as the bank opened; but it is not necessary to draw inferences. It is for the claimant to show when the $23,000 was deposited if that time is essential to his argument. He cannot trace his money by a mere succession of presumption. Some of the modern cases have gone

very far—possibly in some instances too far—in helping out a claimant by presumptions not always reasonable; but in this circuit we have always required some substantive proof as a basis for holding that the owner of trust funds converted by a bankrupt has a lien on some particular part of the bankrupt's property. Carse, the vice-president, testified that the $66,600 check was the first deposit on the 25th, to his recollection, a very uncertain recollection
136 as we have seen, but no one testified and no writing of any sort was introduced to show when the $23,000 was deposited. We cannot therefore find that it was deposited after the certification and since the evidence establihes quite conclusively that the $146,600 check was not certified until 11 A. M. or later there is nothing to show that the $23,000 check and all the others (except perhaps the $17,300), were not absorbed by the certification. If the claimant's $9,600 was included in the $23,000 check, it was then dissipated and can be traced no farther.

The claimant further contends that if the proceeds of his stock were included in the check of Miller & Co. for $266,600 which Brown & Co. deposited on the 24th, it was used to pay a note of Brown & Co. to the Hanover Bank and to release the collateral which secured such note and that therefore he acquired a lien on such collateral. Here again the testimony is insufficient. The vice-president testified that on August 25th, the bank loaned Brown & Co. $50,000 on collateral and $80,000 on collateral. Being asked if that finished with August 24th, he said "they borrowed on that day $85,000 against collateral which was paid off the same day and $200,000 on the 24th, which was paid back the same day." It appears elsewhere in the record that this $200,000 was without collateral. Manifestly the vice-president was testifying only to loans made on the 24th. There is nothing to show whether or not among the enormous transactions of that day, when checks of the bankrupts came into the amount of more than $3,500,000, there were any payments of other notes secured by collateral, nor is there anything to show which of the two loans, the $85,000 or the $200,000, if either, the $266,600 check was applied to. Finally there is nothing to show at what hour these loans were paid off, nor at what hour the $266,600 was deposited. Miller & Co.'s bookkeeper testifies only that it was delivered to Brown & Co. "before three o'clock." Whether it had actually been deposited before the loans were paid is not shown. If it were not deposited until afterwards it certainly was not used to pay them off.

Upon the testimony the only finding we can make is that unless the whole of the claimant's $9,600 was in the $23,000 check some part of it was apparently included in the balance of $6,180.17 which was carried over from the 24th to the 25th. The balance
137 as we have seen in the Princeton Bank case (decided herewith) was swept away by the certification of the $146,600 check and the last remnants of claimant's fund was thus dissipated.

The order is reversed and cause remanded with instructions to dismiss the claim.

RALPH WOLF, *for the Appellant.*
W. B. CRISP, *for the Appellee.*

138 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, Held at the Court Rooms in the Post-Office Building in the City of New York, on the 18th Day of January One Thousand Nine Hundred and Twelve.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

In the Matter of A. O. Brown & Company, Bankrupts; Charles E. Littlefield, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs, and cause remanded to the District Court with instructions to dismiss the claim.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

139 Endorsed: United States Circuit Court of Appeals, Second Circuit. In re A. O. Brown & Co., C. E. Littlefield, Appellant. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 29, 1912. William Parkin, Clerk.

140 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of A. O. Brown & Co., Bankrupts.

In re Claim of Schuyler, Chadwick & Burnham, Claimants.

In re Appeal of Charles E. Littlefield, as Trustee.

Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, copartners trading under the firm name and style of Schuyler, Chadwick & Burnham, claimants herein, conceiving themselves aggrieved by the decree entered herein on the 29th day of January, 1912, in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in so far as said decree fails to find in accordance with the Assignment of Errors hereto annexed, do hereby pray for an order granting leave to appeal from this Court to the Supreme Court of the United States of America;

And they further pray that a transcript of the records, proceedings and papers upon which said decree was made and entered or such parts of them as are pertinent to the said Errors, be duly made, authenticated, certified and sent to the said Supreme Court of
141 the United States of America.

Dated, New York, February 20th 1912.

W. BENTON CRISP,
Solicitor for Schuyler, Chadwick & Burnham.

Office and Post Office Address, 80 Broadway, Manhattan, New York City.

On this 20th day of February 1912, it is ordered that the appeal herein prayed for be allowed as prayed.

H. G. WARD, *U. S. C. J.*

142 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. In the Matter of A. O. Brown & Co., Bankrupts. In re Claim of Schuyler, Chadwick & Burnham, Claimants. In re Appeal of Charles E. Littlefield, as Trustee. Petition and Order Allowing Appeal. W. Benton Crisp, Solicitor for Claimants, 80 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1912. William Parkin, Clerk.

143 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of A. O. Brown & Co., Bankrupts.

In re Claim of Schuyler, Chadwick & Burnham, Claimants.

In re Appeal of Charles E. Littlefield, as Trustee.

Assignment of Errors on Appeal.

Now come Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, copartners trading under the firm name and style of Schuyler, Chadwick & Burnham, claimants herein, by W. Benton Crisp, their Solicitor, and allege that the decree entered herein on the 29th day of January, 1912, is erroneous and against the rights of said claimants in the matters following, to wit:

I.

In that the United States Circuit Court of Appeals for the Second Circuit failed to find:

1. That the claimants' three hundred (300) shares of Interborough Preferred stock were commingled by the bankrupts with one thousand (1,000) shares of Northern Pacific stock and one thousand (1,000) shares of Great Northern stock, of the value of $280,000, and delivered to Miller & Co.

144 2. That the proceeds realized from said three hundred (300) shares of Interborough Preferred stock of the value of

$9,600 were further commingled by the bankrupts with the proceeds realized from other stock of the bankrupts, to wit: one thousand (1,000) shares of Northern Pacific stock and one thousand (1,000) shares of Great Northern stock of the value of $280,000.

3. That the commingled sum of $289,600 contained the proceeds of claimants' stock amounting to $9,600.

4. That the said sum of $289,600 was further commingled by the bankrupts with other assets, deposits and loans of the bankrupts, in the deposit and loan account of the bankrupts with the Hanover National Bank.

5. That said proceeds, $289,600, became a trust fund in the hands of the bankrupts and the Hanover National Bank, for the bentfit of the claimants.

6. That a certain check of Miller & Co. for $23,000 drawn to the order of the bankrupts, was a part of the commingled funds of $289,600 paid by Miller & Co. to the bankrupts and deposited by them in the Hanover National Bank.

7. That the proceeds of claimants' three hundred (300) shares of Interborough Preferred stock was contained in the check of $23,000 received by the bankrupts from Miller & Co. which was a part of the commingled proceeds of $289,600.

8. That the use of the commingled funds of $289,600 by the bankrupts was in payment of their loans and indebtedness to the Hanover National Bank, and discharged and released certain securities held by the bank, as collateral, for the loans made by it and for
45 the indebtedness of the bankrupts to it, pro tanto, and resulted in turning over to the Receiver, after paying all claims of the bank, the sum of $53,597.66, the balance of the proceeds from the sale of said collateral, and that the release of said collateral resulted in turning over to the Receiver intact certain other securities held by the bank, amounting to $37,249, which were pledged for a loan of between $25,000 and $30,000, and for any other indebtedness which the bank held against said bankrupts.

9. That the use of the commingled funds of $266,600 by the bankrupts in paying their indebtedness to the Hanover National Bank, discharged and released certain securities held by the bank as collateral for loans made by it and for the bankrupts' indebtedness to it, pro tanto, and resulted in turning over to the Receiver and Trustee herein, after paying all claims of the bank, the sum of $53,597.66, the balance of the receipts of the sale of said collateral, and also in returning to the Receiver intact certain other securities amounting in value to $37,249, held by the bank as collateral for a loan of between $25,000 and $30,000, and other indebtedness of said bankrupts.

10. That the use of the commingled funds of $23,000 by the bankrupts in payment of their loans, checks and other indebtedness to the bank, discharged and released certain securities held by the bank, amounting to $37,249, for a loan of between $25,000 and $30,000 and their other indebtedness, and also resulted in turning over to the Receiver said securities intact.

11. That the bankrupts had ample assets and deposits with the

Hanover National Bank on the 24th day of August 1908,
146 to pay all checks paid by the bank and all loans made by it, and all other indebtedness to it on that day, without resort to the $9,600 proceeds from claimants' stock; and that the bankrupts had ample assets and deposits in the Hanover National Bank on August 25th, 1908, to pay all their loans and indebtedness to said bank, and all checks paid by the bank on said day, without resort to the $9,600 proceeds of claimants' stock.

12. That the moneys and securities turned over to the Receiver and Trustee by the Hanover National Bank would have been $9,600 less if the proceeds from claimants' stock, amounting to $9,600, had not been commingled in the deposit and loan account of the bankrupts with the Hanover National Bank and used by the bankrupts in paying their indebtedness to said bank.

13. That the claimants are and were entitled to a lien upon the securities or the proceeds realized therefrom amounting to $53,597.56, which were released and discharged by the use of said commingled funds and turned over to the Receiver and Trustee, for their claims, amounting to $9,600 with interest.

14. That the claimants are and were entitled to a lien upon the securities, collateral to the loan of between $25,000 and $30,000, which was turned over to the Receiver intact, and was subsequently sold by said Receiver at a sum in excess of $37,249.

15. That the claimants are entitled to receive $9,600 with interest, out of the sum of $53,597.66 turned over to the Receiver and Trustee by the Hanover National Bank, proceeds realized from the sale of the securities held by the bank, and out of the sum of $37,249 proceeds of the securities which were returned intact to the
147 Receiver and Trustee.

II.

In that the United States Circuit Court of Appeals for the Second Circuit found:

1. That the burden was upon the claimants to show that the proceeds of their stock were not included in a certain check of the bankrupts amounting to $146,600, certified by the Hanover National Bank on August 25, 1908.

2. That said check for $146,600 was not certified until after eleven o'clock on August 25, 1908, and after a check of Miller & Co. for $23,000.00 drawn to the order of the bankrupts was deposited in their deposit and loan account in the Hanover National Bank.

3. That the testimony of H. B. Combs established that fact.

4. That the burden was upon the claimants to show when the check of $23,000 of Miller & Co., drawn to the order of the bankrupts, was deposited by them in their account in the Hanover National Bank.

5. That claimants' $9,600, if included in the $23,000 check was dissipated and could be traced no further.

6. That the proceeds of claimants' stock was swept away by the certification of the $146,600 check and the last remnant of claimants' fund was thus dissipated.

7. That the claimants' claim be dismissed.

Dated, New York, February 19th, 1912.

W. BENTON CRISP,
Solicitor for Schuyler, Chadwick & Burnham.

Office and Post Office Address: 80 Broadway, Manhattan Borough, New York City.

148 (Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. In the Matter of A. O. Brown & Co., Bankrupts. In re Claim of Schuyler, Chadwick & Burnham, Claimants. In re Appeal of Charles E. Littlefield, as Trustee. Assignment of Errors on Appeal. W. Benton Crisp, Solicitor for Claimants, 80 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1912. William Parkin, Clerk.

149 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of A. O. Brown & Co., Bankrupts.

In re Claim of Schuyler, Chadwick & Burnham, Claimants.

In re Appeal of Charles E. Littlefield, as Trustee.

Know all Men by these Presents: That we, Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, as Principals, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, and having an office and usual place of business at No. 49 Cedar Street, in the City of New York, as Surety, are held and firmly bound unto Charles E. Littlefield, as Trustee in Bankruptcy of A. O. Brown & Co., in the full and just sum of five hundred ($500.) Dollars, to be paid to the said Charles E. Littlefield, Trustee as aforesaid, his certain attorney, executor, administrators or assigns, to which
150 payment well and trul- to be made, the said Principals and the said Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 19th day of February, in the year of our Lord, one thousand nine hundred and twelve.

Whereas, lately at a Term of the United States Circuit Court of Appeals for the Second Circuit, in a suit pending in said Court between the said Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, creditors and claimants, appellants, and Charles E. Littlefield, Trustee of A. O. Brown & Co., Bankrupt, Appellee, a decree was rendered against the said Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, and the said Sidney S. Schuyler, John R. Chadwick and

Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, having obtained an order allowing an appeal and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said Charles E. Littlefield, Trustee as aforesaid, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Sidney S. Schuyler, John R. Chadwick, and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, shall prosecute their appeal to effect,
151 and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SIDNEY S. SCHUYLER. [SEAL.]
JOHN R. CHADWICK, [SEAL.]
CHARLES L. BURNHAM. [SEAL.]

Sealed and Delivered in the presence of
[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By ALONZO GORE OAKLEY,
Attorney-in-fact.

Attest:
WILLIAM H. ESTWICK,
Attorney-in-fact.

152 STATE OF NEW YORK,
County of New York, ss:

On this 20th day of Feb. 1912, personally appeared before me Charles L. Burnham, to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

CHARLES L. BURNHAM.

W. C. LLOYD,
Notary Public, Kings County.

C't'f filed in N. Y. Co. N. Y. Co. Reg. No. 2047. Kings Co. Reg. No. 3077.

STATE OF NEW YORK,
County of New York, ss:

On this 20th day of Feb. 1912 personally appeared before me Sidney S. Schuyler to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

SIDNEY S. SCHUYLER.

HENRY B. MYGATT,
Notary Public N. Y. County #209, N. Y. Register #2219.

STATE OF NEW YORK,
County of New York, ss:

On this 20th day of Feb. 1912 personally appeared before me John R. Chadwick to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

JOHN R. CHADWICK.

W. C. LLOYD,
Notary Public, Kings County.

C't'f. filed in N. Y. Co. N. Y. Co. Reg. No. 2047. Kings Co. Reg. No. 3077.

STATE OF NEW YORK,
County of New York, ss:

On the 19 day of Feb., 1912, before me personally came Alonzo Gore Oakley, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he was Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Chapter 33 of the Laws of the State of New York for the year 1909. And the said Alonzo Gore Oakley further said that he was acquainted with William H. Estwick and knew him to be the Attorney-in-fact of said Company; that the signature of said William H. Estwick, subscribed to the within instrument, is in the genuine handwriting of said William E. Estwick, and was subscribed thereto by like order of said Board of Directors, and in the presence of him the said Alonzo Gore Oakley.

C. D. MARSAC,
Notary Public No. 249, New York County.

At a regular meeting of the Board of Directors of the United States Fidelity and Guaranty Company, duly called and held on the first day of May, A. D. 1911, at the office of the Company, in the City of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Sylvester J. O'Sullivan, Manager, or Alonzo Gore Oakley, or Adolphus A. Jackson, or William H. Estwick, or Gilman Ashburner, or Van Tambacht, or J. Frank Supplee, or E. G. Babcock, or A. B. Palmerton, or Henry K. Brent, or George A. Reading, Attorneys-in-fact of this Company, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing

the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing and guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require:

STATE OF NEW YORK,
County of New York, ss:

I, William H. Estwick, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 19 day of Feb. 1912.

WILLIAM H. ESTWICK,
Attorney-in-fact.

153 *Statement.*

United States Fidelity and Guaranty Company.

49 Cedar Street, New York.

Alonzo Gore Oakley, Acting Manager.

At the Close of Business December 31, 1911.

Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$160,000.00	Government Bonds	$162,287.50
2,903,400.00	Baltimore City and other Municipal, State and County Bonds	2,794,391.00
411,000.00	Railroad Bonds	386,775.00
450,000.00	Equipment Bonds	447,580.00
60,000.00	Street Railway Bonds	59,425.00
190,000.00	Miscellaneous Bonds	187,825.00
84,200.00	Bank Stocks	140,539.00
100,000.00	Lawyers Surety Co. Stock	150,000.00
$4,358,600.00	Total Bonds and Stocks—Market Values December 31st, 1911	$4,328,822.50
	Home Office Property—Calvert, German, Grant and Mercer Streets	646,856.91
	Other Real Estate	33,850.00

Loans secured by Collaterals	70,949.00
Loan secured by Mortgage	3,000.00
Cash on Hand and in Banks	597,604.43
Premiums in course of collection, not more than three months due	732,590.09
Due for Subscriptions, Department of Guaranteed Attorneys	43,187.22
Due from U. S. Government under contract	6,276.99
Advance, secured	48,146.75
Cash in Suspended Banks	229,031.91
Interest due and accrued	57,945.91
	$6,798,261.71

Liabilities.

Capital Stock paid in cash		$2,000,000.00
Due for Return Premiums and Reinsurance		17,160.83
Munich Reinsurance Company Reserve Account		21,895.37
Reserve for 1912 Taxes and Expenses in transit		83,724.97
Commissions due on uncollected premiums		144,883.15
Premium Reserve computed in accordance with requirements of New York Insurance Department	$2,445,734.95	
Reserve for Claims and Contingencies	1,124,935.88	
Surplus	959,926.56	4,530,597.39
		$6,798,261.71

STATE OF NEW YORK,
County of New York, ss:

William H. Estwick, being duly sworn, says: that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of Dec. 31, 1911, and that the financial condition of said Company is as favorable now as it was when such statement was made.

WILLIAM H. ESTWICK.

Subscribed and sworn to before me this 19 day of Feb. 1912.

C. D. MARSAC,
Notary Public No. 249, *New York County.*

154 [Endorsed:] United States Circuit Court of Appeals, for the Second Circuit. In the Matter of A. O. Brown & Co., Bankrupt. In re Claim of Schuyler, Chadwick & Burnham, Claimants. In re Appeal of Charles E. Littlefield, as Trustee. Bond. Approved.

H. G. Ward, U. S. C. J., Feb. 20, '12. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 20, 1912. William Parkin, Clerk.

155 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 154 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the Matter of A. O. Brown & Company, Bankrupts, (Claim of Schuyler, Chadwick & Burnham) as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 23d day of February in the year of our Lord One Thousand Nine Hundred and twelve and of the Independence of the said United States the One Hundred and thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

156 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of A. O. BROWN & Co., Bankrupts.

In re Claim of SCHUYLER, CHADWICK & BURNHAM, Claimants.

In re Appeal of CHARLES E. LITTLEFIELD, as Trustee.

The President of the United States of America to Charles E. Littlefield, Trustee in Bankruptcy of A. O. Brown & Co.; Hays, Herschfield & Wolf, Esqs., His Attorneys:

You are hereby cited to appear in the Supreme Court of the United States of America, to be held at the Court Rooms of said Court, in the City of Washington, District of Columbia, within thirty days from the date of this Writ, pursuant to an appeal filed in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, to show cause, if any there be, why the errors mentioned in said appeal should not be corrected and speedy justice should not be given to the parties in that behalf.

Witness, Hon. Henry G. Ward, one of the Judges of the said Circuit Court of Appeals for the Second Circuit, the 20th day of February, 1912.

H. G. WARD,
United States Circuit Judge.

157 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. In the Matter of A. O. Brown & Co., Bankrupts. In re claim of Schuyler, Chadwick & Burnham, Claimants. In re Appeal of Charles E. Littlefield, as Trustee. Original. Citation. W. Benton Crisp, Solicitor for Claimants, 80 Broadway, New York City. Due service of a copy of the within Citation is hereby admitted this 21st day of February 1912. Hays, Hershfield & Wolf, Att'ys for Trustee. United States Circuit Court of Appeals, Second Circuit A. M. Parkin, Clerk. Filed Feb. 21, 1912.

Endorsed on cover: File No. 23,102. U. S. Circuit Court Appears, 2d Circuit, Term No. 213. Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick & Burnham, appellants, vs. Charles E. Littlefield, as trustee in bankruptcy of A. O. Brown & Co. Filed March 18th, 1912. File No. 23,102.

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 213.

SIDNEY S. SCHUYLER, JOHN R. CHADWICK and CHARLES L. BURNHAM, co-partners trading under the firm name and style of SCHUYLER, CHADWICK & BURNHAM,

Appellants,

vs.

CHARLES E. LITTLEFIELD as Trustee in Bankruptcy of A. O. BROWN & Co.,

Appellee.

BRIEF FOR APPELLANTS.

Statement.

This cause comes before this learned Court, upon an appeal (pp. 89-90) by Sidney S. Schuyler, John R. Chadwick and Charles L. Burnham, co-partners trading under the firm name and style of Schuyler, Chadwick and Burnham, from a decree

of the United States Circuit Court of Appeals for the Second Circuit, filed on the 29th day of January, 1912 (p. 89), reversing an order made in this cause on the 20th day of April, 1911, by the Hon. Learned Hand, one of the Judges of the United States District Court, for the Southern District of New York, which provided, among other things, that the Appellee as Trustee in Bankruptcy of A. O. Brown & Co. pay to Schuyler, Chadwick & Burnham, out of the so-called "Hanover National Bank funds," in his hands, Ninety-six hundred ($9600) dollars, the proceeds of the sale of certain shares of stock fraudulently obtained by the bankrupts on the eve of their failure, from Schuyler, Chadwick & Burnham (pp. 80-81).

The proceeding was brought on by a petition filed by Schuyler, Chadwick & Burnham on or about the 8th day of January, 1909, in the original bankruptcy proceedings of A. O. Brown & Co. (pp. 2-7). The petition, after setting forth the parties to the proceedings; the insolvency and bankruptcy of A. O. Brown & Co.; the proceedings in bankruptcy and the election of the trustee, alleged that on or about the 24th day of August, 1908, the firm of A. O. Brown & Co., through one of its members, to wit: Edward F. Buchanan, made an application to the claimants for a loan of three hundred (300) shares of the preferred stock of the Interborough Railway Company, which, at the market price on said date, was worth $32. a share, amounting in the aggregate to $9600., for which sum said Buchanan promised that his firm would forthwith send its check to the claimants, and return said stock on demand; that as an inducement for the making

of said loan the said Buchanan stated and represented to the claimants that the firm of A. O. Brown & Co. was absolutely solvent; that it had ample assets and funds to pay all its obligations in full; that there was no danger of insolvency or bankruptcy; that relying upon said representations, and believing them to be true, the claimants made the loan referred to; delivered said stock to the bankrupts and received their check on the Hanover National Bank, dated on said 24th day of August, 1908, for $9600, too late, however, to be presented for payment or certification on said day; that the same was presented at ten o'clock on the morning of August 25th, 1908, for payment, which was refused; that the representations made by A. O. Brown & Co. were false and untrue; were known so to be by them at the time and were made for purpose of inducing said loan to be made. The petition further allgeged that after the receipt of said stock the bankrupts transferred the same to Miller & Co., and received $9600 therefor from them, which said sum was deposited by said bankrupts in the Hanover National Bank; that in addition thereto the said bankrupts borrowed sundry sums of money from said Hanover National Bank and placed with it certain collateral security therefor, intending that the check of $9600 given to the petitioners should be paid out of the account in which the proceeds of their stock were deposited; that notwithstanding said facts said check was not paid out of said account but that said loans were paid off partly with the proceeds of claimants' stock; that the collateral to said loans was sold by the bank, and that a sum in excess of $50,000

arising therefrom was returned to the trustee of said bankrupts; that said sum and funds constitute a trust fund out of which the peitioners should be paid prior to any payment to the general creditors (pp. 2-7).

The answer interposed by the trustee denied any knowledge or information sufficient to form a belief as to the allegations of the petition and asked for its dismissal (p. 7).

The issues thus framed were referred to one of the Referees in bankruptcy (Mr. Townsend) as Special Master, to take the testimony and report.

The proof consisted of the testimony of the witnesses who were called on behalf of the claimants; the testimony of Mr. Carse, Vice President of the Hanover National Bank, given in the so-called *"Morison case"* decided by the United States District Court of this District in this same bankruptcy proceeding, including the exhibits which were introduced in evidence in that case, in so far as said testimony and exhibits are relevant and material to the issues in this case; the report of the Special Master in the *"Morison case,"* and the order of the District Court thereon (pp. 12 and 37).

The Facts.

The proof submitted on behalf of the claimants abundantly established the allegations of the petition and showed that appellants' stock, consisting of three hundred (300) shares of In-

terborough Preferred, which at the market price that day was worth $9600., had been procured from the claimants by A. O. Brown & Company, the bankrupts, on the 24th day of August, 1908, by means of false and fraudulent representations concerning their solvency, and at a time when they were absolutely insolvent (pp. 27-33); that on the day in question, to wit: the 24th day of August, 1908, the bankrupts converted said stock together with certain others, presumably owned by them, amounting in the aggregate to $289,600., into money by transferring and delivering them to the firm of Miller & Company, that Miller & Company gave to the bankrupts for the stocks so converted two checks, viz. one for $266,600. and the other for $23,000. (pp. 33-35).

The bankrupts for some time prior and at the time of the transactions hereinbefore referred to had kept an account with the Hanover National Bank of New York City. This account was referred to from time to time as the *"Deposit and Loan Account"* because the deposits and loans were carried in one and the same account.

The bankrupts received the first of the checks above mentioned, to wit, the check for $266,600 on August 24, 1908, and deposited it in the account referred to in the Hanover National Bank. (Exh. 1 of February 24th, 1910, p. 75). This check appears to have passed through the Clearing House as of August 24th, 1908, the day of its deposit (pp. 34, 35), although it was probably not in the Clearing House as a matter of fact, until the following morning, it being the custom to stamp checks as paid through the Clearing House on the day of their deposit. The second

check which was for $23,000 was not received by A. O. Brown & Co. until after three o'clock of August 24th, 1908, too late for deposit on that day, but was deposited in the account referred to sometime on the 25th day of August, 1908, as appears by reference to the account (Exh. 1 of February 24th, 1910, p. 75). This check appears to have passed through the Clearing House as of August 25th, 1908 (p. 35), although probably it was not actually presented at the Clearing House until the morning of the 26th.

The proof further showed that on the 24th day of August, 1908, the bankrupts made a number of loans with the Hanover National Bank, all of which were placed to the credit of the account above mentioned (Master's Rep. pp. 12-14; Exh. 1 of February 24th, 1910; pp. 75; 67-71). Two of these loans, one for $200,000.00 and another for $85,000.00, were paid off or discharged during the same day. The other two, viz., one for $50,000 and another for $80,000, were paid off Aug. 25th, 1908 (pp. 70-71).

With the first of the two last mentioned loans there was pledged, as collateral, *500 Great Northern Preferred* (Exh. 4 of February 24, 1910, being Morison Exh. 5-A, pp. 56, 68 and 69).

With the second of said last mentioned loans there was deposited, as collateral:

500 Great Northern Preferred;
200 New York Central;
100 Copper.

(Exh. 3 of February 24, 1910, same as Morison Exh. 5-B, pp. 57, 68 and 69).

Whilst this collateral was deposited with the two loans referred to it was subject to the pro-

visions of a certain so-called Loan Agreement (Exh. 2 of February 24, 1910; pp. 68, 76). In this agreement it was provided that any and all collateral held by the bank should be applicable to all loans (p. 76).

On August 25th, 1908, the bankrupts made three other loans with the Hanover National Bank as follows: One for $250,000; another for $8,000, and still another for between $25,000 and $30,000 (pp. 13, 14, 69, 70).

With the first of these there was deposited as collateral, the following stocks, to wit:

1,000 Steel;
3,000 Copper.

(Exh. 5 of February 24, 1910, same as Morison Exh. 5-C, pp. 58, 69).

With the second of these was deposited as collateral the following stocks, to wit:

100 Southern Pacific.

(Exh. 6 of February 24, 1910, same as Morison Exh. 5-D, pp. 58, 69 and 70).

With the third of said loans there was deposited the following

200 Rep. Steel
5 Chicle
1 Cent. Lthr. pf.
5 W. & L.E. 1st pf.
10 No. Sec. Stubs
13 Newhouse
200 Chgo. Subway
50 Penna.
5 Atch.
15 Ice Secs.
200 Am. Brake Shoe
5 Rock Isld.
20 Int. M Mar pf.
295 Nev. Utah
550 Greene Cananea
100 Cons. Ariz. Sm. & Ref.
5 Steel
10 Hyde & L.
5 Brooklyn Un. Gas
5 Wabash
30 United Copper
1440 Nipissing
490 Cumb. Ely
200 Brit. Col. Copper
5 No. Pac.

(Exh. 7 of February 24, 1910, same as Morison Exh. 5-E. pp. 59, 70).

So that on the 25th day of August, 1908, the bank had this further collateral on hand subject to the Loan Agreement referred to (pp. 70, 71, Master's Rep. pp. 13, 14).

The last mentioned loan of between $25,000 and $30,000 was arranged for on the 24th of August, 1908; was actually made and should have appeared upon the books of the bankrupts at the time of their failure, as cash on hand, but the bank on the 25th day of August, 1908, charged off the loan, released the collateral and returned it intact to the Receiver. (pp. 51, 70; Master's Rep. in Morison case, p. 64, Master's Rep. in this case, pp. 14, 15).

The collateral represented in appellants' Exhibits 3, 4, 5 and 6 (Morison Exhs. 5-A, 5-B, 5-C, 5-D & 5-E (pp. 56-59) was sold out by the bank on August 26th, 1908, for the sum of $441,597.66 which after being applied to the loans above mentioned amounting to $388,000 left a balance of $53,597.67, which was turned over to the appellee, as receiver (Master's Rep. pp. 14, 15, 71).

It thus appears that the proceeds of appellants' stock were deposited in the Hanover National Bank and were used to pay off the bankrupts loans *pro tanto*, thereby releasing collateral held by the bank for said loans or applicable thereto, which collateral was subsequently sold and a part of the proceeds of which, viz., $53,597.67 paid to the appellee.

These are substantially the facts which bear generally upon the subject of the appellants' claim. There are others which may be more appropriately discussed (as to their details) under the various topics to which they specifically apply and with

the permission of the Court we shall pursue that course.

These facts, as the learned Special Master found, are in all essential particulars like those presented in the so-called Morison case above referred to, which was decided in favor of the claimants in that case, and bring the appellants' case clearly within the scope of that decision.

The Special Master in deciding this case said:

> "It seems to me that the material facts in the present case and in the Morison Brothers case do not materially differ and that, as in the Morison case, I should grant an order in favor of the claimants out of the fund for $9600, &c."
>
> (Master's Rep. p. 15.)

The Morison case was decided upon two theories:

First.—That the proceeds of the claimant's stock having been once traced into the so-called Hanover National Bank funds, and the Hanover National Bank having two funds out of which to satisfy its loans, namely, the collateral and the deposit account, should have resorted to its collateral to satisfy its loans, and left the deposit account, which included the proceeds of the claimant's stock in that case, intact, and that in such an event the claimant would have received and was entitled to receive the proceeds of his check out of that fund, and that if the proceeds of claimant's stock were used to pay off the loans and return the collateral given to secure said loans, which collateral or the proceeds of which subsequently was paid to the trustee, the same

should be impressed with a trust in favor of the claimants.

Second.—That the proceeds of the claimant's check having been shown to have been included in the deposits which were made on the 25th of August, 1908, after a certain other check for $146,600 had been certified, that that fund was still intact and should be paid to the receivers.

The Special Master decided the case at bar substantially upon the same theories, for he says:

> "I decided the Morison claim in favor of the claimants, *partly* on this particular circumstance enabling the proceeds of claimants' securities to be traced within Cavin *v.* Gleason, 105 N. Y. 256, and *partly* on the equitable principle that the Hanover National Bank having in its possession two funds equally available to wit: the Bank balance and the collateral, should have had recourse first to the collateral in which the bank alone was interested, and only secondarily to the Bank balance in which the other creditors were interested" (p. 15).

The learned District Judge (Hand) agreed with the Special Master in the result reached and practically followed him upon the first theory (pp. 78, 79, 80), but failed to find with him upon the second.

The learned Circuit Court of Appeals refused to accept either of these views and ordered appellant's claim dismissed (p. 88). We submit that in so doing, it was in error, concerning which we have made proper assignments (pp. 90-92).

The appellants' contentions are:

I.

That the learned Circuit Court of Appeals erred in that it failed to find:

1. That the claimants' three hundred (300) shares of Interborough Preferred stock were commingled by the bankrupts with one thousand (1,000) shares of Northern Pacific stock and one thousand (1,000) shares of Great Northern stock, of the value of $280,000, and delivered to Miller & Co.

2. That the proceeds realized from said three hundred (300) shares of Interborough Preferred stock of the value of $9,600 were further commingled by the bankrupts with the proceeds realized from other stock of the bankrupts, to wit: one thousand (1,000) shares of Northern Pacific stock and one thousand (1,000) shares of Great Northern stock of the value of $280,000.

3. That the commingled sum of $289,600 contained the proceeds of claimants' stock amounting to $9,600.

4. That the said sum of $289,600 was further commingled by the bankrupts with other assets, deposits and loans of the bankrupts, in the deposit and loan account of the bankrupts with the Hanover National Bank.

5. That said proceeds, $289,600, became a trust fund in the hands of the bankrupts and the Hanover National Bank, for the benefit of the claimants.

6. That a certain check of Miller & Co. for $23,000 drawn to the order of the bankrupts, was a

part of the commingled funds of $289,600 paid by Miller & Co. to the bankrupts and deposited by them in the Hanover National Bank.

7. That the proceeds of claimants' three hundred (300) shares of Interborough Preferred stock was contained in the check of $23,000 received by the bankrupts from Miller & Co. which was a part of the commingled proceeds of $289,600.

8. That the use of the commingled funds of $289,600 by the bankrupts was in payment of their loans and indebtedness to the Hanover National Bank, and discharged and released certain securities held by the bank, as collateral, for the loans made by it and for the indebtedness of the bankrupts to it, *pro tanto,* and resulted in turning over to the Receiver, after paying all claims of the bank, the sum of $53,597.66, the balance of the proceeds from the sale of said collateral, and that the release of said collateral resulted in turning over to the Receiver intact certain other securities held by the bank, amounting to $37,249, which were pledged for a loan of between $25,000 and $30,000, and for any other indebtedness which the bank held against said bankrupts.

9. That the use of the commingled funds of $266,600 by the bankrupts in paying their indebtedness to the Hanover National Bank, discharged and released certain securities held by the bank as collateral for loans made by it and for the bankrupts' indebtedness to it, *pro tanto,* and resulted in turning over to the Receiver and Trustee herein, after paying all claims of the bank, the sum of $53,597.66, the balance of the receipts of the sale of said collateral, and also in returning to

the Receiver intact certain other securities amounting in value to $37,249, held by the bank as collateral for a loan of between $25,000 and $30,000, and other indebtedness of said bankrupts.

10. That the use of the commingled funds of $23,000 by the bankrupts in payment of their loans, checks and other indebtedness to the bank, discharged and released certain securities held by the bank, amounting to $37,249, for a loan of between $25,000 and $30,000 and their other indebtedness, and also resulted in turning over to the Receiver said securities intact.

11. That the bankrupts had ample assets and deposits with the Hanover National Bank on the 24th day of August, 1908, to pay all checks paid by the bank and all loans made by it, and all other indebtedness to it on that day, without resort to the $9,600 proceeds from claimants' stock; and that the bankrupts had ample assets and deposits in the Hanover National Bank on August 25th, 1908, to pay all their loans and indebtedness to said bank, and all checks paid by the bank on said day, without resort to the $9,600 proceeds of claimants' stock.

12. That the moneys and securities turned over to the Receiver and Trustee by the Hanover National Bank would have been $9,600 less if the proceeds from claimants' stock, amounting to $9,600, had not been commingled in the deposit and loan account of the bankrupts with the Hanover National Bank and used by the bankrupts in paying their indebtedness to said bank.

13. That the claimants are and were entitled to a lien upon the securities or the proceeds realized therefrom amounting to $53,597.56, which were

released and discharged by the use of said commingled funds and turned over to the Receiver and Trustee, for their claims, amounting to $9,600 with interest.

14. That the claimants are and were entitled to a lien upon the securities, collateral to the loan of between $25,000 and $30,000, which was turned over to the Receiver intact, and was subsequently sold by said Receiver at a sum in excess of $37,249.

15. That the claimants are entitled to receive $9,600 with interest, out of the sum of $53,597.66 turned over to the Receiver and Trustee by the Hanover National Bank, proceeds realized from the sale of the securities held by the bank, and out of the sum of $37,249 proceeds of the securities which were returned intact to the Receiver and Trustee.

II.

That said Court erred in finding:

1. That the burden was upon the claimants to show that the proceeds of their stock were not included in a certain check of the bankrupts amounting to $146,600, certified by the Hanover National Bank on August 25, 1908.

2. That said check for $146,600 was not certified until after eleven o'clock on August 25, 1908, and after a check of Miller & Co. for $23,000.00 drawn to the order of the bankrupts was deposited in their deposit and loan account in the Hanover National Bank.

3. That the testimony of H. B. Combs established that fact.

4. That the burden was upon the claimants to show when the check of $23,000 of Miller & Co., drawn to the order of the bankrupts, was deposited by them in their account in the Hanover National Bank.

5. That claimants' $9,600, if included in the $23,000 check was dissipated and could be traced no further.

6. That the proceeds of claimants' stock was swept away by the certification of the $146,600 check and the last remnant of claimants' fund was thus dissipated.

7. That the claimants' claim be dismissed.

POINT I.

The bankrupts wrongfully and fraudulently converted the property of the appellants.

The Special Master found that the bankrupts not only wrongfully, but fraudulently converted the appellants' property, and that the appellants had the right to rescind the transaction and to follow their stock, or its proceeds (p. 11). The District Judge concurred in this finding (p. 78). The learned Circuit Court of Appeals did likewise (p. 85). It is the settled rule of this Court that the concurrent action of two or more courts upon questions of fact will not be disturbed. We, therefore do not deem it necessary to further discuss this subject.

POINT II.

The bankrupts commingled the proceeds of appellants' property with that of their own, and the combined or commingled funds having been traced into the Hanover National Bank funds, a part of which are now in the hands of the trustee, so long as any portion of said funds remained, the appellants are entitled to have their money paid out of them and if said funds were used to release collateral in the bank, which collateral, or the proceeds of which collateral, went into the hands of the trustee, they should be impressed with a lien in favor of the appellants.

Gorman vs. Littlefield, 229 U. S., 19;
Peters vs. Bain, 133 U. S. 670;
Frelinghuysen vs. Nugent, 36 Fed Rep. 229, at p. 239, approved in *Peters vs. Bain, supra,* p. 693;
In re Marsh, 116 Fed. Rep. 396.
In re Erie Railroad Co. vs. Dial, 140 Fed. Rep. 689.
In re Royea, 143 Fed. Rep. 182.
Smith vs. *Motley,* 150 Fed. Rep. 266.
Smith vs. *Township, &c.,* 150 Fed. Rep. 257.
In re Stewart, 178 Fed. Rep. 463, pp. 470, 1, 5-77;

National Bank vs. Insurance Co., 104 U. S., 54;
Cavin vs. Gleason, 105 N. Y. 256;
Knatchbull vs. Hallet, L. R. 13 Ch. Div. 696.

The facts and principles involved in the cases cited are so familiar to this learned Court, that we shall not attempt to abstract them, or quote from them in the body of this brief. For the convenience of the Court, however, we have abstracted some of them and added them in an appendix hereto.

The learned District Judge rested his decision squarely upon the principles set forth in our point and found that the facts of the case at bar, showed such a commingling of property as to bring it clearly within the equitable doctrines which we have invoked.

Now what are those facts? As we have herefore pointed out as soon as the bankrupts received appellants' stock on August 24, 1908, they combined it with certain other stocks of their own, took them to Miller & Co. and converted them all into cash. The transaction was as follows:

1000 Shares Northern Pacific, valued at	$143,000
1000 Shares Great Northern, valued at	137,000
300 Shares Interborough Preferred (our stock) valued at.....	9,600
Total	$289,600

In payment of this sum of $289,600 Miller & Co. gave the bankrupts two checks, both dated on the same day, to wit: August 24th, 1908. The first

check, which was for $266,600 of the combined fund was deposited in the Hanover National Bank on that day and was thereby still further commingled by the bankrupts with several million dollars of other deposits and loans made by them on that day. The second check, which was for $23,000 of the combined fund was received by the bankrupts evidently too late for deposit on August 24th, 1908, and was not deposited until the next morning, to wit: Tuesday, August 25th, 1908, but when deposited also went into the Hanover National Bank (pp. 34, 35; Master's Rep. p. 12; Exh. 1 of February 24th, 1910, p. 75), and was thereby further commingled with several hundred thousand dollars of deposits and loans made on that day.

So that it clearly appears that the proceeds of appellants' stock amounting to $9,600 was combined and commingled with the proceeds realized from the bankrupts' stock and the identity of appellants' stock disappeared in the general mass. It is equally clear that the combined or commingled funds went into the Hanover National Bank either in the $266,600 check or in the $23,000 check.

From claimants' standpoint, upon the principles invoked, it is immaterial whether a part of the claimants' proceeds went into the bank in the $266,600 check, or whether a part of it went in, in the $23,000 check. If any portion of the combined or commingled funds remained in the bank or subsequently went into the hands of the trustee the appellants are entitled to have them impressed with a lien in their favor. Again if those funds were used on the day of the failure or the day before to release, *or contributed to the release*

of collateral which was held by the bank, which collateral subsequently went into the hands of the trustee, either in the form of cash or in collateral itself, such cash and such collateral should be likewise impressed with a lien in favor of the appellants. In other words, *if the proceeds of appellants' stock augmented or tended to augment the property or fund which ultimately went into the hands of the trustee,* the appellants are entitled to a lien upon said property or said fund. Now let us see what uses were made of the commingled funds.

I. As to the use of the $266,600 check.

The proof shows that on Monday, August 24th, 1908, the day when the $266,600. was deposited, two loans, both made that day, one for $200,000 and another for $85,000, aggregating $285,000 were paid off by the bankrupts to the Hanover National Bank (p. 45; Exh. 1 of Feby. 24, 1910, p. 75). In order to do this it was necessary for the bank to use the check of $266,600 which had been obtained from Miller & Co. and which was deposited on that day. If those loans had not been paid off the balance on hand at the end of business on August 24th, 1908, and at the beginning of business on August 25th, 1908, would have amounted to $285,000, plus the balance of $6,180.17, which was actually shown at the end of business on that day by the testimony of Mr. Carse (p. 45). This would have made a total balance of cash on hand at the expiration of business on August 24th, 1908, and at the commencement of business on August 25th, 1908, of $291,180.17, and the proceeds of appellants' check, if contained in the check for $266,600 would have

been intact on the morning of the 25th, the day the Receiver was appointed. But by paying off the two loans aggregating $285,000, the bank released the securities which it held in its possession as collateral to other loans in the bank, and which were also collateral for the two loans that were paid off, because under its Loan Agreement all collateral in the bank was liable for any loan which was there (Exh. 2 of Feby. 24, 1910, p. 76, also p. 50). The discharge of those loans by the use of the $266,600 of the commingled funds released the collateral which the bank held, to that extent. This identical collateral, as we have heretofore seen (Brief, p. 8), was disposed of by the bank and part of the proceeds, $53,597.67, turned over to the Trustee (p. 14).

We submit therefore that the check of $266,600 containing the commingled funds having been used to release the collateral for the loans above referred to, and to place said collateral, or the proceeds realized therefrom, in the hands of the appellee, said proceeds should be impressed with a lien in favor of the appellants.

II. As to the use of the $23,000. check.

The proof shows that on Tuesday, August 25th, 1908, the day when the $23,000. check was deposited, a loan for $30,000. which the Special Master found had been actually made on August 24th, 1908, and the collateral therefor actually deposited with the bank, was paid off, or charged off, and the collateral therefor (Exh. 5-E, p. 59) returned *in kind* to the appellee, as re-

ceiver (pp. 51; 64, 65, 70). A part of this collateral was subsequently sold by the appellee for the sum of $37,249.00, leaving considerable of it unsold at the time of the Special Master's report (pp. 8, 9). Owing to some neglect on the part of the bank, this $30,000.00 was not posted in the *"Deposit and Loan Account"* of the bankrupts, but it was none the less a credit to them in the bank on that day and should have been credited to said account.

The proof also shows that another loan of $250,000., made about 10 o'clock in the morning of August 25th, 1908, was also paid off on the same day by a check of the bankrupts for the amount of the loan (p. 70) and the collateral attached thereto (Exh. 5-C, p. 58) together with certain other collateral was sold out by the bank and the net proceeds, amounting to $53,597.66, were paid over to the appellee (p. 14). This amount likewise through some fault on the part of the bank was not posted in the *"Deposit and Loan Account"* of the bankrupts, but it was none the less a credit to them in the bank on that day, because, as heretofore stated, it was paid off by a check for like amount during the day.

These two loans, one made late in the day of the 24th of August, 1908, and the other the very first thing on the morning of the 25th of August, which together with the cash balance of $6,180.17, left over from August 24th, 1908, aggregating $286,180.17, gave the bankrupts ample moneys to meet all their payments on the 25th day of August, 1908, which appears from the bank account did not exceed $151,367.24 (p. 75), and would have left a substantial balance to the credit of the bankrupts, at the time of their failure on August

25th, 1908, which cash balance would have gone into the hands of the appellee, except for the payment of said loans.

If that cash balance had gone into the hands of the bankrupts, is there any doubt but what a Court of Equity, under the principles set forth in the cases cited under our point, would have fastened a lien upon it for the amount of appellants' claim? We think not. If such a lien would have been fastened upon said cash balance in the hands of the bankrupts, it would have been fastened upon said cash balance in the hands of the appellee who stands in the shoes of the bankrupts.

But by the use of the cash balance in the payment of loans and the discharge of collateral, the appellee ultimately received as the proceeds of said collateral a sum in excess of $90,846, which was $9,600 more than he would have received if the proceeds of appellants' property had not gone into said cash balance. In other words, the amount which the appellee received from the sales of the released collateral was *augmented* at least to the extent of $9,600 (the amount of appellants' claim), and should under the authorities cited be charged with a lien in favor of appellants to that extent.

It makes no difference, it seems to us, whether the balance which was turned over to the appellee was in cash or was in collateral, which was released by the use of the cash. The result, so far as the appellee is concerned, is precisely the same. Either the cash was *continuously* in the bank until it was turned over to the appellee, or the securities, which had been released by the use of the cash, were *continuously* in the bank until they, or their proceeds, were turned over to the appellee.

But the learned Circuit Court of Appeals says that there is no proof in the record before the Court to show that the commingled funds containing the proceeds from appellants' property were used to pay off loans and to release the collateral referred to, and that it was appellants' duty to furnish that proof. In this connection the learned Court said:

> "He (appellant) cannot trace his money by mere succession of presumption. Some of the modern cases have gone very far—possibly in some instances too far—in helping out a claimant by presumptions, not always reasonable; but in this circuit we have always required some substantive proof as a basis for holding that the owner of trust funds converted by a bankrupt has a lien on some particular part of the bankrupt's property" (pp. 87, 88).

We respectfully submit, however, that no such duty or obligation as is indicated by the learned Court of Appeals rested upon the appellants, and in this respect the learned Court was in error. If the rule of the Second Circuit is as stated, then we submit it is not in keeping with the true modern rule (which the learned Court below is disinclined to follow) but which is well expressed in the case of *Smith* v. *Mottley*, 150 Fed. Rep., 266, decided by the Circuit of Appeals of the Sixth Circuit (Judge Severens writing the opinion). The learned Court in that case said:

> "In the absence of any proof to the contrary, the reception of the funds being so near to the assignment by the bank, it may be presumed that the assets which came to the hands of the trustee were augmented by

the appropriation of the proceeds of the check. If it were not so, the burden was on the trustee to prove it; or if not augmented to the whole amount of the check, then to what amount they had been lost out. It is shown that three times the amount of this fund remained in the bank to the time of the assignment and came to the trustee. The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer, is upon the owner; but when this is done, the burden shifts to the wrong-doer. It is for him to distinguish between his own property and that of the innocent party.

Smith, Trustee, v. *Township of Au Gres,* 17 Am. B. R. 745; *Hart* v. *Ten Eyck,* 2 Johns. Ch. 108; *Star* v. *Winegar,* 3 Hun (N. Y.), 491; *Stephenson* v. *Little,* 10 Mich. 441, 450; *Ryder v. Hathaway,* 21 Pick. (Mass.) 298, 306; *Seavey* v. *Dearborn,* 19 N. H. 361; *Robinson* v. *Holt,* 39 N. H. 557; *James* v. *Burnett,* 20 N. J. L. 635, 642; *Kreutzer* v. *Coon,* 45 Md. 591; *Elgin Bank* v. *Schween,* 127 Ill. 580; *Mayer* v. *Wilkins,* 37 Fla. 244; *Weil* v. *Silverstone,* 6 Bush. 698; *Stuart* v. *Phelps,* 39 Ia. 20; *Loomis* v. *Green,* 7 Me. 386; *Dillingham* v. *Smith,* 30 Me. 383; *Lehman* v. *Kelley,* 68 Ala. 192; *Franklin* v. *Gumersall,* 9 Mo. App. 90.

Again, if the trustee takes the bankrupt's property in the same plight as the bankrupt held it, and while the bankrupt held the assets, they became subject to a lien upon the mass, which was not destroyed by its continual transformation in business from day to day, the paying out and receiving in, of parcels of the fund, and no creditor having levied upon it, or the right of an innocent party fastened upon it, it is difficult to see how by the succession of the trustee the lien could be lost. Whether it was a lien or not would continue to be the same question as

it was between the bankrupt and the owner of the misappropriated fund.

If this is the true modern rule, all that it was necessary for the appellants to do was to trace the general mass containing their property into the bank account of the bankrupts in the Hanover National Bank. That having been done the presumption arises that the bankrupts used their own money to pay their checks and other obligations before they in any wise resorted to the trust funds, and the burden was then shifted to the bankrupts, or to their trustee who stands in their shoes, to show what uses were made of the commingled funds. For example it was not incumbent upon the appellants to show by exact proof that the $266,600 check, containing part of the trust funds was on the 24th day of August, 1908, applied specifically to the payment of the loans of $285,000. paid off on that day; nor was it incumbent upon them to show by exact proof that the check for $23,000. containing part of the trust funds was applied on the 25th day of August, 1908, specifically to the payment of the loans discharged that day. The law will presume that the bankrupts used and exhausted their own funds to meet their checking account during that day, and that they did not use the trust funds or any part of them, except as a last resort. This being the situation, the appellants occupy the most favorable position which the facts and circumstances warrant. In other words, if the appellee claimed that these funds were used to pay the checks presented to the bank on that day it was incumbent upon him to have shown that they were so used, and that they did not go to the dis-

charge of the loans which were paid off on the 24th and 25th days of August, 1908.

The appellee contended below that the commingled funds represented by the two checks of $266,600. and $23,000. were used by the bankrupts in the payment of checks presented over the counter of the bank on the 24th day of August, 1908, and in a check for $146,600, certified by the bank on the morning of the 25th of August, 1908. The learned Circuit Court of Appeals adopted this view and stated:

> "Upon the testimony the only finding we can make is that unless the whole of the claimant's $9,600. was in the $23,000. check some part of it was apparently included in the balance of $6,180.17, which was carried over from the 24th to the 25th. The balance, as we have seen in the Princeton Bank case (decided herewith) was swept away by the certification of the $146,600. check and the last remnants of claimant's fund was thus dissipated." (p. 88).

We respectfully submit that in this the learned Court erred, because there was no evidence in this case, and the appellee never offered any to show that the commingled funds were applied to any such specific purposes. As we have heretofore pointed out, if that was his position, the burden was upon him to show those facts, but in this he absolutely and totally failed. On the contrary, every inference from the facts, which were proven, warranted the conclusion that the $146,600. check was certified upon the faith of the cash balance at the end of the day on the 24th day of August, the loans which were actually arranged for and made on said day, and the loans and deposits which were made on the morning of August 25th,

before the $23,000. check was deposited. The Special Master so found. He said:

> "The testimony of Carse, the cashier of the Hanover National Bank, given in the Morison case * * * * indicates, and I so find, that the deposit of A. H. Combs & Co.'s check for $66,600, mentioned hereafter, and the immediate certification of the check, mentioned hereafter, of A. O. Brown & Co. to the order of A. H. Combs & Co. for $146,600., was the first transaction on the morning of Tuesday the 25th, and preceded the deposit of Miller & Company's $23,000. check, and that the certification mentioned was made not on the faith of the $23,000. check, but upon the faith of A. H. Combs & Co.'s check and the firm's equity in the securities pledged as collateral for the loans which had been made or arranged over night or early on Tuesday morning." (Bottom of p. 19).

And again he says:

> "I also found that the certification of the $146,600. check to the order of A. H. Combs & Co. preceded on Tuesday morning the deposit of the $23,000. check, and was not made on the faith of such check." (p. 25).

We submit that the proof fully justified these findings of the Special Master. It showed that the check for $146,600. was presented to the bank on the afternoon of August 24th, 1908, but was not certified on that day, because of insufficient funds, and was held over until the next morning (pp. 43-44); that in the meantime one loan for between $25,000. and $30,000. and another for $250,000. were arranged for and actually made; that a large amount of collateral was deposited with the said loans and that the loans themselves

should have been entered, and should have appeared in the bank statement, (the "Deposit and Loan Account") but that the failure of the bankrupts took place before they could be posted in that account (pp. 45, 51). It also appeared that there was a deposit of $66,600. very early in the morning,—indeed it was the very first deposit which was made,—and that immediately thereafter the $146,600. was certified (pp. 43, 44).

We submit, therefore, that there was ample proof to show that the $146,600. check was certified on the faith of the deposit of $66,600. and the loans and collateral referred to, as the Special Master found.

The learned counsel for the appellee, however, contended that the check for $23,000. was the first deposit made on August 25th, 1908, because it so appears in the bank statement (Exh. 1, Feb. 24, 1910), and that therefore the check for $146,600. must have been certified upon the faith of that deposit, but in this he is not correct. Mr. Carse, the Vice-President of the bank, testified that the bank statement did not show the deposits in their order, and that the very first check which was deposited on the 25th of August, 1908, was the $66,600. check which was a deposit by itself, evidenced by a separate slip, and that immediately after said deposit was made the check for $146,600. was certified (pp. 44, 52). Mr. Carse was asked the following questions on this subject and gave the following replies:

> "Q. When was this check certified?
> A. That was certified August 25th, 1908.
> Q. Have you any means of telling what time on August 25th?
> A. Why, it was certified *very early in the morning, first thing in the morning.*" (p. 43).
>
> * * * * * *

"Q. Now, after which deposit on the 25th of August, 1908, did you authorize the certification of this check?

A. After the deposit of $66,600.

Q. Do you know whether that was the first deposit made on the 25th of August or not?

A. It was the first, to my recollection.

Q. How soon after the deposit did you authorize the certification?

A. Immediately." (p. 44).

POINT III.

All equities are in favor of the appellants.

Every equity in this case is in favor of the appellants' position. They have been fraudulently deprived of their property and if they are unable to obtain it in this proceeding, the general creditors of the bankrupts will profit by their fraudulent acts of the latter. This is not in keeping with the policy of the bankruptcy law.

In a recent case in this Court, *Hurley* v. *Atchison, T. & S. F. R. Co.*, 213 U. S., 126 at p. 134, where a similar situation was presented, the learned Court (the late Justice Brewer writing the opinion), after discussing the case at length, quoted with approval the opinion of Judge Adams in the same case in the Circuit Court of Appeals (153 Fed. Rep., p. 507), as follows:

> " 'If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creat-

ing an equitable charge or lien, however inartificially it may have been expressed.' "

"We fully approve of this interpretation of the transaction. Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day, as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings."

This learned Court also cited with approval *In Re Chase, et al., 124 Fed. Rep. 753,* wherein the learned Circuit Judge (Putnam) said:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

Upon this subject the Special Master said:

> "The circumstances under which they were deprived of their property create an exceptional equity in their favor which should relieve them from any heavier burden of proof than is necessary for the proper protection of the general estate from unlawful claims of this character. The circumstances under which the claimants were deprived of their property develop no equity in favor of the general creditors. The claimants neither voluntarily left their securities in the possession of A. O. Brown & Co., nor imposed in them any trust or credit, but simply parted with their property on cash terms which were never complied with and accordingly conferred no title to the stock."
>
> (Master's Rep., p. 18.)

So that we submit every equity is in favor of the appellants.

POINT IV.

We respectfully submit that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

W. Benton Crisp,
Solicitor for Appellants,
Schuyler, Chadwick & Burnham,
80 Broadway,
Manhattan,
New York City.

W. Benton Crisp,
Theodore M. Crisp,
Of Counsel.

APPENDIX.

INDEX OF CASES.

Appendix.

Gorman v. Littlefield, 229 U. S. 19.

In this case the facts were substantially as follows:

The claimant before the failure of A. O. Brown & Co., the bankrupt, a brokerage firm was one of its customers. On or about April 14, 1908, Gorman directed the Chicago office to buy 250 shares of Green Cananea Copper stock for him. The stock was bought on the understanding that it was to be paid for in full and at the time that the order was executed the claimant had sufficient credit balance with the firm applicable on its books to the payment in full of the shares purchased. The certificates of stock were left by the claimant in the possession of the broker subject to the claimant's future order.

It was proven that the *identical shares* purchased for the account of the claimant never came into the possession of the receiver or trustee of the bankrupt, because they had been delivered or transferred in the ordinary course of bankrupt's business by the bankrupt to other persons almost immediately after they had been bought for the claimant's account.

At the time of the filing of the petition, the receiver in bankruptcy, now the trustee, came into possession of and still had in his possession certificates of the same stock as that ordered by the bankrupt, for an aggregate of 350 shares, but as before stated, the receiver and trustee never had in their possession the *identical shares* purchased for the claimant. As to this 350 shares no claim

had been filed with the receiver or trustee, and the time for filing claims had expired.

The certificates of stock in question, with those purchased for other clients, which were paid for in full or were purchased on margin, were placed by the bankrupts without discrimination in the same tin box. It was customary to take certificates and to make delivery from that box indiscriminately unless the certificate had been transferred to the name of the customer. At no time before the failure did the claimant receive his shares of the Green Cananea Copper stock nor did he order its sale.

The question presented upon this appeal involves the right of a customer of a bankrupt brokerage firm to shares of stock purchased for him by the bankrupt and fully paid for by the claimant prior to the filing of the petition, notwithstanding the certificates in the possession of the bankrupt are not *the identical ones* purchased for the account of the claimant.

The matter was referred to a Master who found in favor of the claimant. The District Court ruled otherwise, as did the Circuit Court of Appeals, and it is from the decision of that Court that the claimant appeals. The Supreme Court reversed the rulings of the District and United States Circuit Courts, and held that the claimant was entitled to recover 250 out of the 350 shares which came into the possession of the trustee.

The Court says, by Mr. Justice Day, on page 23:

> "Upon these facts the question is, Are these shares of stock a part of the general estate for the benefit of creditors or should they be turned over to the claimants?

In *Richardson* v. *Shaw*, 209 U. S. 365, the nature of this property was the subject of discussion and decision in this court. In that case a broker, who had been adjudicated a bankrupt, shortly before the bankruptcy and after his insolvency turned over upon demand to a customer shares of stock similar to those which had been held for the customer and for an equal number of shares. It was contended that under the circumstances this delivery of certificates amounted to a preference under the Bankruptcy Act. This Court therefore had to consider the legal relation of customer and broker, in buying and holding shares of stock, and it was held that * * * * * stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. It was therefore concluded that the turning over of the certificates for the shares of stock belonging to the customer and held by the broker for him did not amount to a preferential transfer of the bankrupt's property.

* * * * *

It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw, supra.*

It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer

claimed any right in those shares of stock. (pp. 24-25)

* * * * *

No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt. (p. 25)

Smith v. Mottley, 150 Fed. Rep., 266.

The facts in this case were as follows: The bankrupt was a private banking firm. One of the members of the firm was the owner and holder of a note as security for a loan made by the bankrupt to one E. H. S. The owner of the note assigned it to one of the bank's depositors as an investment, before the maturity thereof, and while both the bank and all of its partners were insolvent, the maker of the note, E. H. S., wishing to pay it, delivered her check for the amount due thereon to the partner, who was the owner and payee of the note, upon his promise to deposit the check in the bank to the credit of the assignee of the note, and to obtain the surrender of the note.

The bank had no authority to receive payment of the note, and subsequently but prior to the return of the assignee of the note it made an assignment for the benefit of creditors about ten days after collecting the check. At the time of the assignment the bank had on hand three times the amount of the check which funds came into the hands of the Trustee in Bankruptcy.

The maker of the note commenced these proceedings to recover the amount paid to the bank as a priority claim. It was held by the Circuit

Court of Appeals in reversing the order of the District Court which disallowed the claim, that the petitioner should be entitled to recover.

The Court says, by Severens, J., on pages 268-269:

> "In the absence of any proof to the contrary, the reception of the funds being so near to the assignment by the bank, it may be presumed that the assets which came to the hands of the trustee were augmented by the appropriation of the proceeds of the check. If it were not so, the burden was on the trustee to prove it; or if not augmented to the whole amount of the check, then to what amount they had been lost out. It is shown that three times the amount of this fund remained in the bank to the time of the assignment and came to the trustee. The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer, is upon the owner; but when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party. *Smith, Trustee* v. *Township of Au Gres, supra; Hart* v. *Ten Eyck,* 2 Johns Ch. 108; *Star* v. *Winegar,* 3 Hun, (N. Y.) 491; *Stephenson* v. *Little,* 10 Mich. 441, 450; *Ryder* v. *Hathaway,* 21 Pick. (Mass.) 298, 306; *Seavey* v. *Dearborn,* 19 N. H. 361; *Robinson* v. *Holt,* 39 N. H. 557; *James* v. *Burnett,* 20 N. J. L. 635, 642; *Kreuzer* v. *Coon,* 45 Md. 591; *Elgin Bank* v. *Schween,* 127 Ill. 580; *Mayer* v. *Wilkins,* 37 Fla. 244; *Weil* v. *Silverstone,* 6 Bush (Ky.) 698; *Stuart* v. *Phelps,* 39 Ia. 20; *Loomis* v. *Green,* 7 Me. 386; *Dillingham* v. *Smith,* 30 Me. 383; *Lehman* v. *Kelley,* 68 Ala. 192; *Franklin* v. *Gumersall,* 9 Mo. App. 90.
>
> Again, if the trustee takes the bankrupt's property in the same plight as the bankrupt held it, and while the bankrupt held the assets, they became subject to a lien upon the mass, which was not destroyed by its continual

transformation in business from day to day, the paying out and receiving in, of parcels of the fund, and no creditor having levied upon it, or the right of an innocent party fastened upon it, it is difficult to see how by the succession of the trustee the lien could be lost. Whether it was a lien or not would continue to be the same question as it was between the bankrupt and the owner of the misappropriated fund.

There would seem to be a valid distinction in the application of the rule that the misappropriated fund must be found in the assets, between the settlement of an estate in bankruptcy proceedings and proceedings upon a bill filed for the marshalling and appropriation of assets according to the principles of equity. In the latter case there is a seizure of the rest for the direct purpose of fastening the inchoate rights of creditors. In the former the trustee takes the estate as he finds it. But, however this may be, we think that upon the grounds previously stated, the order of the district judge should be reversed and the order of the referee restored, and with costs."

Smith v. Township of Au Gres, Michigan, 150 Fed. Rep., 257.

The facts in this case were as follows: The bankrupt was engaged in business as a retail merchant in Au Gres. He was chosen treasurer of the township and received and collected certain moneys belonging to the township, amount-to a considerable sum of money. At the close of his official year in 1904, he was short in his accounts $4,474.87, which sum he failed to refund to the township. On April, 1904, he gave a mortgage on his stock of goods to one Chamberlain, as trustee, to secure the township and the surety on his official bond, if it should be com-

pelled to pay his shortage, for the amount thereof, reciting therein that during the incumbency of office he had received funds belonging to such township, aggregating a large sum, which moneys he had invested in his business instead of keeping them separate and apart as required by law, and that there is now invested in his business and property funds belonging to the township of Au Gres aggregating the sum of $4,400., and that it was his intention to treat the moneys which came into his hands as treasurer of the township as trust funds. Chamberlain, the trustee, was an agent of the bonding company upon the bankrupt's official bond as treasurer of the township. In May, 1904, a petition in bankruptcy was filed against him by his creditors. The trustee sold the stock of merchandise which the bankrupt had on hand for the sum of $4,179.77. The township filed a petition in the bankruptcy proceedings, alleging that the bankrupt had used the funds of the township in the purchase of the goods and merchandise which, or the proceeds of which had come to the hands of the trustee, and that the township claimed a lien upon the proceeds of the sale for the amount of its funds so converted, the sum claimed being $4,460.

The claim of the township was dismissed by the referee, but his decision was reversed by the District Court, and an appeal was taken to this Court by the trustee.

> "The ground of the referee's decision, was, as stated by him, that 'there is no testimony and no evidence that any of the goods, wares or merchandise taken possession of by the receiver were purchased and paid for with moneys of the township of Au Gres.'" (p. 259)

The proof showed that the bankrupt had purchased goods, wares and merchandise with the commingled funds, and that these were the goods which the trustee had sold at the sale.

The Court says, by Severens, J., pp. 260-261:

> "Where, as in this case, a wrong-doer knowingly mingles the property of another with his own in such manner that it becomes undistinguishable, the true owner may claim the whole mass, or if it has been disposed of, may follow it, or its proceeds as the case may be, as long as he can trace them, for the purpose of fastening an equitable lien for the property of which he has thus been dispossessed. *National Bank* v. *Insurance Co.*, 104 U. S. 57; *Knatchbull* v. *Hallett*, 13 Ch. Div. 696, 36 Moak's Eng. Rep. 779; *Holder* v. *Western German Bank*, 136 Fed. 90; *Erie R. Co.* v. *Dial*, 140 Fed. 689.
>
> "When the commingled property is of more value than that wrongfully taken, it is equitable that the excess should go to the creditors of the wrong-doer, although by the strict rule of the common law the whole mass might become the property of the innocent owner of the portion misappropriated. Justice requires that the rights of innocent third parties having acquired the property, or some interest in it, for value, should be protected, and against such the rule is not enforced. But here the trustee stands in the shoes of the bankrupt and has only his rights. Of course, we are speaking of the general rule, and do not need to notice the instances of conveyances and preferences fraudulent as against creditors. And the question is what were the respective rights of the township and the bankrupt when the creditors filed their petition against him. The bankrupt's trustee says that it is imposible to find out what parts of the stock of goods contain the money of the township, and this was the difficulty which the referee found and which con-

trolled his decision. But it was not for the township to make the distinction. As said by Chancellor Kent in *Hart* v. *Ten Eyck*, 2 Johns Ch. 62, at page 108, 'If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it.' That case represented a state of facts which in this respect was quite similar to those which existed here. The fair inference is that the bankrupt took the money from time to time, purchased goods and mingled them with his stock, and out of his stock he sold parcels, which were not distinguishable in respect of the means with which they were bought. From the beginning of his fraudulent intermixture of his own money and that of the township, or of goods which may have been bought with his own money and others bought with the money of the township, if the latter did not become the owner of the commingled stock, it had, at least, a lien upon it for reimbursement; and the continuance of such transactions operated in the same way. In the circumstances of the present case, the township proceeded in the proper way by seeking an enforcement of the lien and not by claiming the proceeds of the sale by virtue of the absolute ownership of the stock of goods, a course which, if the proceeds of the sale were more than the township's actual due, might work a hardship upon creditors. So the creditors have no cause to complain on that score. For these reasons, we are of the opinion that the trustee, standing on the right of the bankrupt, cannot successfully object to the lien claimed by the township upon the ground that the funds of the latter have been so commingled in the bankrupt's stock of goods that they could not be identified."

In Re Marsh, 116 Fed. Rep., 396.

The report of the Referee which was adopted by the Court, says, on page 397:

> "In Massey *v.* Fisher (C. C.), 62 Fed. 958, the headnote is as follows: 'The fact that the money was not marked, and, by mingling with the other funds of the bank, lost its identity, does not affect the right to recovery in full, if it can be traced to the vaults of the bank, and it appears that a sum equivalent to it remained continuously therein until removed by the receiver.' "

Page 398:

> "In Central National Bank *v.* Connecticut Mut. Life Ins. Co., 104 U. S. 55, 26 L. Ed. 693, the United States Supreme Court quotes with approval the leading English case of Knatchbull *v.* Hallett (*In re* Hallett's Estate), 13 Ch. Div. 696, in which the master of the rolls states the 'modern doctrine of equity' to be that the beneficial owner of trust funds is entitled to their proceeds, provided only he can identify them, and if, by reason of the mingling of the trust money with that of the trustee, the means of identification fails, the *cestui que trust* is entitled to a charge upon the net investment, 'to the extent of the trust money traceable into it.' This rule modifies the old dictum of Lord Ellenborough, that the fund could not be followed when it had been turned into money, and confounded in a general mass of the same description, since 'money has no earmarks.' * * *"

In adopting the report of the Referee, and in overruling the exceptions which were filed thereto, the Court, by Platt, D. J., says, on page 399:

> "My reason for this ruling is twofold: (1) In the decision of questions of controverted fact I must depend upon the conclusions arrived at by the referee. He has every opportunity for arriving at the truth."

Erie Railroad Co. v. Dial, 140 Fed. Rep., 689.

The facts were as follows: The bankrupt was engaged in manufacturing rubber tires. Prior to the time of the filing of the petition, it purchased certain crude rubber from the assignors of the claimant to convert into tires, to be paid for on delivery. The rubber was shipped with drafts attached to the bill of lading. The railroad company unloaded the rubber upon a platform near the bankrupt's factory, and it was forthwith taken and used by the bankrupt with other rubber in making tires before the drafts were presented and the same were not paid. Claims having been made upon the railroad company by the shippers for wrongful delivery, that company purchased and took assignments of the claims of the shippers against the bankrupt. It was held that the action of the bankrupt in taking possession of the rubber and mingling it with its own property, without making payment therefor, was wrongful and gave it no title as against the shippers or their assignee, who succeeded to their rights, and that such assignee was entitled to recover from the bankrupt's trustee in preference to general creditors the value of such portion of the rubber or its proceeds as came into his hands.

The Court says, Severens, C. J., p. 691:

> "The trustee says that the rubber company converted the rubber into tires and commingled them with other tires which it had on hand, and that the property can be no longer identified. But the vendors of the rubber never consented to this. In a common-law court this might, as between the owners and the trespasser, have given title to the owners of the whole mass of tires, if they were indistinguishable. But a court of equity, for the purpose of saving to creditors that value which attached to the things before owned by the trespasser, will forbear to en-

force a confiscation, and, instead, will accord a lien to the owner upon the mass for the value of the things converted. We had occasion to consider this subject in Holder *v.* Western German Bank, 136 Fed. 90, 68 C. C. A. 554, where we held, upon the authority of Knatchbull *v.* Hallett, 13 Ch. Div. 696, and National Bank *v.* Insurance Co., 104 U. S. 54, 26 L. Ed. 693, that, where the tort-feasor had mingled the property of the owner with his own, a lien would attach to the mass *pro tanto*. The assets came to the trustee in this condition. His interest therein is no other or greater than that of the bankrupt, except where the bankrupt has conveyed his property with intent to defraud his creditors. Mueller *v.* Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; In re F. B. Shuster Co., 134 Fed. 43, 46, 67 C. C. A. 117. We recognize that the rule only permits the following of the converted property into assets which can be traced as proceeds, and that the lien does not attach to assets in which neither the thing nor its value can be found."

In re Royea's Estate, 143 Fed. Rep., 182.

The Court says:

"HANFORD, District Judge. It appears from the record that at the time of the adjudication the bankrupt had on deposit in a bank $390.70, which has since come into the possession of the trustee of his estate. The deposit included $120, which the petitioner had theretofore intrusted to the bankrupt for safe-keeping. There is no controversy as to the fact that the bankrupt did receive the sum mentioned, which belonged to the petitioner, nor as to the circumstances attending the transaction. It was the mutual understanding of the parties that the money was not loaned to the bankrupt, but intrusted to him to be returned when the petitioner should require it. The specific money was not required to be returned, but the petitioner was

to be satisfied upon receiving an equivalent amount in any money. The bankrupt did not keep the money separately, but made a deposit thereof in a bank in which he had other money on deposit, so that it became mingled with other money held by the bank subject to his check, and the balance to his credit exceeded the amount received from the petitioner, at all times continuously from the date of the deposit until it was withdrawn by the trustee, who now has it in custody. The petitioner prays to have the sum which he intrusted to the bankrupt paid to him out of the money which the trustee of the bankrupt's estate drew from the bank, on the ground that his rights are superior to the rights of general creditors, and the referee decided the question in the case in his favor, on the ground that in the administration of bankrupt's estate the principles of equity are to be applied, rather than the strict rules of law.

The main argument in opposition to the petition is that, trust money must be earmarked or separately kept in order to entitle the *cestui que* trust to reclaim it, in opposition to creditors of an insolvent debtor, and that where a bankrupt has mingled trust funds with his own, so that the identity of the trust money is lost, the beneficiaries of the trust must share *pari passu* with creditors. * * * Nevertheless, I concur in the opinion filed by the referee in this case, and for the following reasons: Subdivision 'a' of section 70 of the present bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451) prescribes the rule to be applied in the determination of questions as to what property vests in the trustee of a bankrupt's estate. The rule of the statute is that the trustee shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, to property, not exempt, which prior to the

filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.

"Consideration of this rule leads to the inquiry whether the bankrupt, after he had become insolvent and immediately before the petition was filed, could have transferred the balance to his credit in the bank, so as to have defeated the petitioner in a suit in equity to reclaim his part of it, or whether an attaching or execution creditor, by levying upon the balance in the bank under judicial process against the bankrupt, could have divested the petitioner of his beneficial interest in the fund? To this inquiry equity gives a negative answer. In the opinion of the Supreme Court, by Mr. Justice Matthews, in the case of National Bank *v.* Insurance Co., 104 U. S., 54, 26 L. Ed. 693, the English and American authorities are exhaustively reviewed, and the decision as condensed in the syllabus was that:

> 'As long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property.'

* * * * * * * *

"In this case, although the money cannot be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim an amount equivalent to the amount intrusted is clear. San Diego County *v.* Cal. Nat. Bank

(C. C.) 52 Fed. 59; Massey *v.* Fisher (C. C) 62 Fed. 958; City of Spokane *v.* First Nat. Bank of Spokane, 68 Fed. 982, 16 C. C. A. 85; Brandenburg on Bankruptcy (3d Ed.), p. 768.

Let an order be entered affirming the decision of the referee."

In re Hallett's Estate-Knatchbull v. Hallett, L. R. 3, Ch. Div. 696.

The salient facts were as follows:

One Hallett, a solicitor, was a trustee of certain Russian bonds. The cestuis que trust were the trustees under his marriage settlement and a certain Mrs. Cotterill, one of his clients. Without authority and improperly he sold the bonds and by his direction the proceeds of them were placed to his credit in his bank and were there intermingled to the credit of the same account with other funds belonging to himself. He drew out by ordinary check from time to time moneys from this account which he used for his own purposes. He died in February, 1878, and at his death it appeared that the account at the bank contained more money to his credit than the sum of trust money that had gone into it, but that had every payment made after November 1877 (the day when the bonds were unlawfully converted) been applied to the first items on the credit side in order of date, a large portion of the trust money would have been paid out. After Hallett's death an action was instituted against his personal representatives by the trustees under his marriage settlement and Mrs. Cotterill, the cestuis que trust of the bonds, to recover the full amount of their respective claims from the bank fund into which the proceeds of the converted bonds had been deposited, and which said fund had passed into the

hands of the defendants in the action, Hallett's personal representatives.

The opinion of the Court of Appeal was written by Sir George Jessel, Master of the Rolls, one of the best known Judges of the English Bench and whose decisions upon equity matters are of the very highest authority. He says in the prevailing opinion on page 709:

> "There is no distinction, therefore, between a rightful and a wrongful disposition of the property, so far as regards the right of the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position, in a purchase. He may have bought land with it, for instance, or he may have bought chattels with it. Now, what is the position of the beneficial owner as regards such purchases? I will, first of all, take his position when the purchase is clearly made with what I will call, for shortness, the trust money, although it is not confined, as I will show presently, to express trusts. In that case, according to the now well-established doctrine of Equity, the beneficial owner has a right to elect either to take the property purchased, or to hold it as a security for the amount of the trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money. *But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the cestui que trust or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely, but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust-money laid out in the*

purchases; and that charge is quite independent of the fact of the amount laid out by the trustee. The moment you get a substantial portion of it furnished by the trustee, using the word 'trustee' in the sense I have mentioned, as including all persons in a fiduciary relation, the right to the charge follows. That is the modern doctrine of Equity."

(Italics are ours.)

* * * * * * * *

"Therefore, the moment you establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply. I intentionally say modern rules because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time —altered, improved, and refined from time to time." (p. 710)

* * * * * * * *

"I have only to advert to one other point, and that is this—supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee, using the term again in its full sense as including every person in a fiduciary relation, does it make any difference according to the modern doctrine of equity? I say none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a Judge in Equity would find any difficulty in saying that the *cestui que trust* has a right to take 1,000 sov-

ereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it. It would make no difference if, instead of one sovereign, it was another 1,000 sovereigns; but if instead of putting it into his bag, or after putting it into his bag, he carries the bag to his bankers, what then? According to law, the bankers are his debtors for the total amount; but if you lend the trust money to a third person, you can follow it. If in the case supposed the trustee had lent the £1,000 to a man without security, you could follow the debt, and take it from the debtor. If he lent it on a promissory note, you could take the promissory note; or the bond, if it were a bond. *If, instead of lending the whole amount in one sum simply, he had added a sovereign, or had added £500 of his own to the £1,000, the only difference is this, that instead of taking the bond or the promissory note, the cestui que trust would have a charge for the amount of the trust money on the bond or promissory note. So it would be on the simple contract debt; that is, if the debt were of such a nature as that, between the creditor and the debtor, you could not sever the debt into two, so as to show what part was trust money, then the cestui que trust would have a right to a charge upon the whole.* (Italics are ours.) Therefore, there is no difficulty in following out the rules of Equity and deciding that in a case of a mere bailee, as Mr. Justice Fry has decided, you can follow the money." (p. 711)

On pages 714 *et seq.* the Master of the Rolls ably discusses and disposes of the contention of the personal representatives of Hallet's Estate that trust moneys which have been wrongfully converted by a trustee have to be specifically and definitely earmarked and identified in order to be recovered in the

hands of a third person, and it was stated by the Court that this doctrine, although formerly the law, has under modern equity doctrines been repudiated, and that such earmarking of moneys is not necessary at the present day in order to recover them.

On page 719, he says:

> "The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether there remains nothing to be the subject of the trust. But so long as the trust property can be traced and followed into other property into which it has been converted that remains subject to the trust."

On pages 727-728:

> "When we come to apply that principle to the case of a trustee who has blended trust moneys with his own, it seems to me perfectly plain that he cannot be heard to say that he took away the trust money when he had a right to take away his own money. The simplest case put is the mingling of trust moneys in a bag with money of the trustee's own. Suppose he has a hundred sovereigns in a bag, and he adds to them another hundred sovereigns of his own, so that they are commingled in such a way that they cannot be distinguished, and the next day he draws out or his own purposes £100, is it tolerable for anybody to allege that what he drew out was the first £100, the trust money, and that he misappropriated it, and left his own £100 in the bag? It is obvious he must have taken away that which he had a right to take away, his own £100. What difference does it make if, instead of being in a bag, he deposits it with his banker, and then pays in other money of his own, and draws out some money for his own purposes? Could he say that he had actually drawn out anything but his own

money? His money was there, and he had a right to draw it out, and why should the natural act of simply drawing out the money be attributed to anything except to his ownership of money which was at his bankers."

And on page 730:

"* * * * No human being ever gave credit to a man on the theory that he would misappropriate trust money, and thereby increase his assets. No human being ever gave credit, even beyond that theory, that he should not only misappropriate trust moneys to increase his assets, but that he should pay the trust moneys so misappropriated to his own banking account with his own moneys, and draw out after that a larger sum than the first sums paid in for the trust moneys."

In re Stewart, 178 Fed. Rep. 463, holds:

Where a claimant has deposited money in a private bank of a bankrupt at a time when the latter was insolvent and knew himself to be so, but the claimant was ignorant of this fact, a trust for the benefit of the claimant was impressed on the general fund with which the claimants deposits had been commingled and that claimant could follow that fund into the hands of the trustee in bankruptcy, so long as it was never exhausted and remained greater than the amount of his deposits. It was also held, that the claimant was entitled to reclaim his deposits even though it affirmatively appeared that the general fund was kept up by the deposits of subsequent depositors who did not draw out their deposits and had not been paid.

Quoting from the facts found, Ray, D. J., says on page 465:

"These deposits were made in the usual way and commingled with the other moneys of Stewart, received on deposit in the usual course of business so as to be incapable of identification. When these deposits were made by Mitchell (the claimant), Stewart, (the bankrupt) was hopelessly insolvent and he had been insolvent for more than a year, and these facts Stewart well knew; but Mitchell was ignorant of such insolvency when he made these deposits, and remained ignorant thereof until about the 5th day of November, 1908, when the truth was disclosed by an examination of the bankrupt.

Mitchell learned of Stewart's insolvency at the time he closed his doors, but did not learn the fact that Stewart received such deposits when insolvent, and knowing he was insolvent until the date mentioned. There is no evidence that the other depositors mentioned, except two who have like proceedings pending, did or did not know Stewart was insolvent when they made their deposits. The evidence is silent on that subject."

The trustee contended in defense of this claim among other things:

"That even though he (the claimant) could withdraw his claim and rescind the contract of deposit and recover same he cannot do this in such a case as this, unless he identifies the money on hand at the close of the doors of the bank, as his money or as including his money or as proceeds of some part thereof, in which case he can only recover the part shown to be on hand. (p. 466)

* * * * * * * * * * * *

That it would be grossly inequitable to allow one depositor to get his money in full from the balance on hand when others during the same time had made deposits under the same circumstances and had not drawn the same. That this would be taking the

money of the other depositors to pay this particular depositor * * * in full." (p. 466)

On Page 467, the Court says:

"To give Mitchell the right to rescind the deposit contract and proceed on the ground a fraud had been practiced, and that he was therefore entitled to his money deposited, less that drawn out, it was necessary that he be able to establish not only the insolvency of Stewart when the deposits were made and received, but that Stewart then knew he was insolvent and that Mitchel did not. *The fraud consists in receiving a deposit when hopelessly insolvent with knowledge of the fact concealing that condition from the innocent depositor.* St. Louis & San Francisco R. Co. v. Johnston, 133 U. S. 566, 576, 10 Sup. Ct. 390, 33 L. Ed. 683; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Anonymous cause, 67 N. Y. 598; Cassidy v. Uhlmann, 170 N. Y., 505, 515, 63 N. E. 554; Atkinson v. Rochester. etc., 114 N. Y. 168, 175, 21 N. E. 178. (Italics are ours.)

In St. Louis, etc. v. Johnston, supra, the court said, citing and approving the New York cases:

'When a bank has become hopelessly insolvent, and its president knows that it is so, it is a fraud to receive deposits or checks from an innocent depositor, ignorant of its condition, and he can reclaim them or their proceeds.' "

On Page 472, the Court says:

"Here there was no question that the money deposited was in the bank when it closed its doors, or that it came into the hands of the receiver although mingled with other funds."

On page 477 the Court says:

"But if the commingled fund is being constantly augmented by new deposits and drawn upon and the fund is not reduced below the deposits in question then it is assumed as matter of law that identity is established.

It seems to be assumed that 'first in, first out,' and that in such a case as this, as shown by the table, as there was always a balance greater than Mitchell's deposits, it is presumed his money was in the moneys on hand when the bank closed. I think this more a legal fiction than a matter of fact; but nevertheless I am bound to follow the doctrine and apply it here on the theory that, when Mitchell's money was obtained by the fraudulent concealment it was impressed with a trust for his benefit which attached to the general fund with which his deposits were commingled, and that this trust followed that fund so long as it was never exhausted but remained greater than the amount of Mitchells deposits, and finally came to the hands of the Trustee, even though it affirmatively appears that the fund may have been kept up by the deposit of thousands of dollars by other depositors who have not been paid and whose moneys were not drawn out by them."

Supreme Court of the United States,

OCTOBER TERM, 1913—No. 213.

SIDNEY S. SCHUYLER, JOHN R. CHADWICK and CHARLES L. BURNHAM, copartners trading under the firm name and style of SCHUYLER, CHADWICK & BURNHAM,
Appellants,

AGAINST

CHARLES E. LITTLEFIELD, as Trustee in Bankruptcy of A. O. BROWN & Co.,
Appellee.

This is an appeal from the decree of the United States Circuit Court of Appeals for the Second Circuit, filed January 29th, 1911, reversing the order of the District Court awarding the appellants the relief sought by them in this proceeding.

The decision of the Circuit Court of Appeals is reported under the title *In re A. O. Brown & Co.*, 193 Fed., 30.

Many of the transactions involved in this cause are the same as those considered by this Court in the case of *First National Bank of Princeton* vs. *Littlefield*, 226 U. S., 110, which was tried and decided by the Circuit Court of Appeals at the same time as the case at bar (193 Fed., 24).

The Facts.

On Monday, August 24, 1908, the bankrupts obtained from the appellants three hundred shares

of Interborough Railway Company stock. Said stock was loaned by appellants to the bankrupts under an agreement made by the bankrupts with the appellants to pay the value thereof. After repeated demands, the appellants finally received the bankrupts' uncertified check on the Hanover National Bank for $9,600. This check was received on August 24, 1908, too late for certification on that date. On the next day, an assignment for the benefit of creditors intervened, and the check was not paid (pp. 28-31).

The three hundred shares of stock thus obtained by the bankrupts were immediately delivered by the bankrupts on August 24, 1908, to Miller & Co. (pp. 33-35).

On August 24, 1908, the bankrupts received two checks from Miller & Co., one for $266,600, and one for $23,000 (pp. 34, 35).

Both of these checks, which are in evidence and copied in full in the record (pp. 34, 35), represented payments by Miller & Co. to the bankrupts of stocks delivered to Miller & Co. by the bankrupts on August 24, 1908, including the said three hundred shares of Interborough Railway Company stock.

It is conceded, therefore, that the bankrupts converted appellants' stocks and that the proceeds thereof, amounting to $9,600, became trust moneys in their hands belonging to the appellants.

The only question to be considered is, whether or not the appellants have successfully traced the proceeds of their stock into the possessions of the receiver or trustee.

The said proceeds were, as heretofore stated, represented by one or both of the said checks received by the bankrupts from Miller & Co. Both checks were deposited by the bankrupts to their own credit in their deposit and checking account with the Hanover National Bank. The check of $266,600 was so deposited on August 24, 1908 and the check of $23,000 on August 25, 1908. The original deposit slip for this check of $23,000 had been dated the

24th, but, apparently, the check was not sent to the bank in time to be credited as a deposit on that date (pp. 34 35).

After the deposit on August 24 of the said check of $266,600, the bankrupts withdrew various sums of money from their said account, with the result that at the close of business on said day and at the opening of business on the 25th, the amount to their credit in the deposit account was $6,180.17 (p. 21).

The account rendered by said bank of its transaction with bankrupts, (Exhibit "I" February 24, 1910, appearing between pages 74 and 75 of the record), shows the deposits and withdrawals on August 25th.

The total deposits and credits to the account on August 25, including the said balance of $6,180.17, amounted to $151,367.24 (p. 72).

During the morning of the said day a check to the order of A. H. Combs & Co. for $146,600 was certified (p. 46).

What part of the said $151,367.24 had been deposited at this time this check was certified is a question at issue.

It is undisputed, however, that a check of $17,300, which forms a part of the total credits of $151,367.24, had not yet been deposited (pp. 66-67).

Therefore at the time of the certification of the check of $146,600 the total sum on deposit did not exceed $134,067.24.

Obviously the certification of the Coombs check of $146,600, entirely depleted the account, and all trust moneys previously deposited in the account must be regarded as having been dissipated thereby.

It is admitted that the check of Miller & Co of $266,600 was deposited prior to such depletion, being deposited August 24th. The check of $23,000 was deposited on the 25th. The question presented is, did the appellants prove that it was deposited after the certification of the Coombs check.

The Circuit Court of Appeals found the appellants had not proven this fact and reversed the District

Court upon this ground. Both Courts were of the opinion the appellants could not recover unless the deposit was made after the certification of the checks to order of A. H. Coombs & Co. (pp. 78-80, 85-88).

The evidence in respect to this deposit consists of the exhibits and the testimony of Mr. Carse, the cashier of the bank, and is as follows:

The Coombs check was certified immediately after the deposit of a $66,600 check (p. 44). Referring to the account, Exhibit "I" (between pp. 73, 74), it will be seen that the first credit item of August 25, 1908, is a loan of $8,000, and the second credit item is a deposit of $23,000, and that the credit item of $66,600 appears further down in the account and immediately preceding the credit item of $17,300, which it is conceded was made after the certification of the Coombs check. Said check was therefore apparently certified between the time of the making of the two deposits and after the deposit of $23,000.

Mr. Carse's testimony was that the $66,600 check was "the first deposit to his recollection," and that the certification was immediately thereafter (p. 44). He stated, said check was deposited "somewhere about ten o'clock" (p. 52). His recollection is uncertain and he admits his best recollection as to what checks entered into the certification is that any check coming in after eleven o'clock would not have counted in certifying the Coombs check (p. 53).

As already stated, the $23,000 check of Miller & Co. was dated August 24, 1908, and delivered on that day. The bankrupts made out an original deposit slip, dated August 24, 1908, but apparently the check was not sent to the bank in time to be deposited on the 24th (p. 12). Undoubtedly it constituted the first deposit on the 25th.

An examination of the account Exhibit 1 further shows that the account did not justify the certification of the Coombs check, if the first deposit on the 25th was the $66,600 deposit and no other deposit had been made. The balance that morning was

only $6,180.17, an $8,000 loan was credited to the account, and if only $66,600 was deposited, the total credit to the account of the bankrupts was only $80,780.17. In addition the bank had securities deposited by the bankrupts on the 24th on which it had agreed to loan $25,000 to $30,000, but which loan had not yet been made upon the books at the time of the certification of the Coombs check. Considering the loan as made the total credits without the other deposits was only $110,780.17. The amount of the certification was $146,600. On the other hand if the deposits were made in the order shown in the account the total credit after the $66,600 deposit was made, was $134,067.24, and as the bank had in addition securities on which it had agreed to loan $25,000 to $30,000, it was safe in certifying the check of $146,600, for it could at any time make the account balance by making the loan of $25,000 to $30,000 and entering it upon the account. It was unnecessary so to do, as the subsequent deposit of $17,300 made good the amount of the over-certification (see Exhibit 1, printed between pages 74 and 75).

The appellants in their brief refer to certain loans made by the bank to the bankrupts on the 24th and 25th as affecting the situation, and we will state briefly the facts in regard thereto.

On the morning of August 24th, the bank made four loans to the bankrupts, one of $200,000 unsecured, and three secured loans, one of $85,000, one $80,000 and one $50,000 (p. 68). All these loans had been actually credited to the account of the bankrupts and the proceeds used by them, as appears from the account Exhibit "I." The two loans of $200,000 and $85,000 were paid by the bankrupts on that day. The two secured loans, one of $50,000 and the other of $80,000, remained unpaid and were paid after the making of the assignment by the bankrupts by the liquidation of the securities held therefor (p. 71).

The bankrupts had also, on the afternoon of the 24th, applied for a further loan from the bank,

which the bank had agreed to make, and had delivered to the bank certain securities (p. 70). The bank had agreed to loan to the bankrupts the sum of from $25,000 to $30,000. As appears from the account and from the testimony, this loan however, was never actually made, but the securities were held by the bank and were returned to the receiver (p. 51).

On the 25th and prior to the certification of the Coombs check, the bank had made a secured loan to the bankrupts of $8,000, which was credited to the account of the bankrupts, as appears by the account, Exhibit "I." It also made a secured loan to the bankrupts of $250,000, which was not credited to the account but was evidently paid directly to the bankrupts (p. 45).

The loans somewhat complicate the account, but, as will be hereinafter shown, do not really affect the situation herein.

The sole question is, did the appellants prove that the funds held in trust for them came into the hands of the receiver or trustee.

POINT I.

The burden was on the appellants to show that their property, or the proceeds thereof, came into the hands of the trustee.

First National Bank of Princeton vs. *Littlefield*, 226 U. S., 110.

In re McIntyre, 181 Fed., 960.

American Can Co. vs. *Williams*, 178 Fed.. 420.

Matter of Hicks, 170 N. Y., 195.

POINT II.

All trust funds deposited by the bankrupts in the Hanover National Bank prior to the certification on August 25th of the check of $146,600 to the order of A. H. Coombs & Co. were dissipated by the certification of said check, and no funds so deposited came into the hands of the receiver or trustee.

The balance to the credit of the bankrupts with the Hanover National Bank on the morning of August 25th was $6,180.17 (p. 21). The total credits on the 25th, including said balance, amounted to $151,367.24 (Exhibit 1). This included $17,300 not deposited till after the certification of the check of $146,600. to the order of A. H. Coombs & Co. (pp. 60-67). If all other deposits on that day were made prior to the certification of said check, the total credit to the account at said time was $134,067.24. The certification, therefore, of the check of $146,600 more than exhausted the account, and all trust funds theretofore deposited became dissipated.

Upon the same facts, it was so decided by this Court in case of *First National Bank of Princeton* vs. *Littlefield*, 226 U. S., 110. In that case, the claimant proved that the proceeds of his stock had been deposited by A. O. Brown & Co. in their account in the Hanover National Bank, and had not been wholly withdrawn prior to August 25th, 1908. This Court sustained the decision of the Court below that the certification of the Coombs check of $146,600 depleted the account, and it was no longer possible to trace the trust funds theretofore deposited. The appellant in said case claimed, as do the appellants in the case at bar, that it had an

equity in the securities held as collateral to the various loans made to the bankrupts by the bank on the 24th and 25th of August, 1908, some of which securities and the proceeds thereof were subsequently turned over by the bank to the receiver, and it based its contentions upon this branch of the case upon the same facts as are proven in the case at bar. This is apparent from the record of said case, from the opinions of the Circuit Court of Appeals in the said case and in the case at bar, reported in 193 Fed., at pages 24 and 30, respectively, and from the report of the Special Master upon both cases, printed at pages 10 to 27 of the record herein.

The question was fully presented to this Court upon said appeal, and when the appellant was unsuccessful it made a motion for reargument, again presenting the questions to this Court, and the Court denied the said motion.

POINT III.

It is admitted that the proceeds of appellants' stock, amounting to $9,600, were contained in the sum of $289,600 received by the bankrupts from Miller & Company in two checks, one for $266,600 and the other for $23,000.

POINT IV.

It is admitted that the check of $266,600 received from Miller & Company was deposited in the Hanover National Bank prior to the certification of the check to the order of A. H. Coombs & Co., being deposited on August 24th. If the proceeds of appellants' stocks were contained therein, they concededly did not come into the hands of the trustee.

As shown in Point II, the certification of the check to the order of A. H. Coombs & Co. depleted the accounts, and no funds deposited prior to such certification came into the hands of the receiver or trustee.

POINT V.

The appellants failed to prove that the check of $23,000 was deposited in the Hanover National Bank subsequently to the certification of the $146,600 check to the order of A. H. Coombs & Co., and, therefore, failed to prove their claim. The evidence shows said $23,000 was deposited prior to such certification.

As heretofore stated, the burden of proof herein is upon the appellants. To recover it was necessary for them to show, the deposit of the trust funds was subsequent to the certification of the Coombs check. This they failed to do.

The only evidence in support of their contention is the statement of Mr. Carse to the effect that he

authorized the certification immediately after the deposit of the $66,600 check, and, when asked whether he knew whether that was the first deposit, his statement "it was the first to my recollection" (p. 44). Mr. Carse, however, when questioned further upon the subject, showed that his recollection was uncertain. When questioned, as to whether the check of $17,300 entered into the certification of the Coombs check, he stated he did not know whether it had been deposited before the certification or afterwards, but that fact depended upon the time of the certification (p. 53). He stated that if it were not deposited before twelve o'clock, it did not enter into the certification. When questioned further, he testified (p. 53) as follows:

> "Q. What is your best recollection?
> A. I should say that if it came in after eleven o'clock, it would not have been counted in my figures."

It is, therefore, clear that Mr. Carse did not have any independent recollection as to what checks had been deposited and entered into his figures when he certified the Coombs check for $146,000, and what he evidently meant by his statement that the deposit of $66,600 was the first deposit to his recollection on August 25th, was that it was the first deposit which he could remember, and the sum and substance of his testimony is that any check which was deposited prior to eleven o'clock entered into it.

If we are to understand Mr. Carse literally that the check of $66,600 was the only deposit made prior to the certification of the Coombs check of $146,600, then this bank certified this check of the bankrupts for $146,600 at a time when the total credit to their account was $110,780.17, to wit, $6,180.17 the balance in the morning; $8,000 a loan credit; $66,600 deposit; $25,000 to $30,000 loan not yet made for which the bank had collateral. This is too improbable to be the fact.

The $23,000 check was given to A. O. Brown &

Co. on the 24th and a deposit slip made out by them on that day, but the deposit was not received owing to the fact that it was too late. It is, therefore, probable that it was deposited the first thing on the 25th (pp. 34, 35). At any rate, the appellants failed to prove when it was deposited, or that it was deposited after eleven o'clock.

The written account made up by the bank, Plaintiff's Exhibit "I", indicates that the $23,000 check was deposited before the certification of the Coombs check, for, according to that account, it is the first deposit made on the 25th. Furthermore, unless it had been deposited, the bank would not have certified the Coombs check, because it would not have had sufficient funds or securities so to do.

The total deposits on August 25th, inclusive of the balance on hand, were $151,367.24. The bank also held certain securities which it had received from the bankrupts on the 24th, and upon which it had agreed to make a loan of from $25,000 to $30,000, but which loan it had not in fact made (p. 51). At the time the Coombs check was presented for certification, it had not yet received the check of $17,300 which is included in the $151,367.24 (pp. 6-67), so that, at the most, the total deposits were $134,067.24. If the $23,000 check had not been deposited, the deposits were only $111,067.24, and even in view of the fact that the bank held securities on which it had agreed to loan from $25,000 to $30,000, it would not have been justified in certifying a check to the extent of $146,000. On the other hand, if it had received the $23,000 deposit, then the amount to the credit of the bankrupts aggregated $134,067.24, and, in view of the fact that it held securities on which it had agreed to loan $25,000 to $30,000, it was then justified in certifying the Coombs check, for, if further deposits were not made, it could make the loan, enter it on its books and be fully protected. As the $17,300 was subsequently deposited, it was unnecessary for it to make the $25,000 to $30,000

loan, and these securities were subsequently returned to the trustee.

The fact that they did certify the check is absolutely conclusive that the $23,000 was deposited prior to the certification of the Coombs check and prior to the depletion of the account.

Certainly, in view of these facts, under no circumstances can it be said that the appellants proved that it was deposited subsequently.

The appellants in their brief mention the fact that there was a loan of $250,000 made by the bank to the bankrupts on the 25th, and that this loan justified the certification. However, it is clear from the testimony of Mr. Carse that this loan did not have anything to do with this account (p. 51). It was not entered therein, nor were any checks drawn against it. *The loan was made by giving a check directly to the bankrupts, not as in the case of the other loans by placing a credit to the account against which the bankrupts could draw or certify checks.*

POINT VI.

Even if this Court should believe that the $23,000 check was deposited subsequently to the certification of the check of A. H. Coombs & Co., the appellants are not entitled to recover, because they failed to prove that the $9,600 received from Miller & Co. for appellants' stock was contained in the check of $23,000.

The two checks of Miller & Co., one of $266,600 and the other of $23,000, were delivered to the bankrupts in payment for the following securities:

1,000 shares Northern Pacific.....	$143,000
1,000 shares Great Northern Preferred.	137,000
300 shares Interborough Preferred....	9,600
	$289,600

As the burden of proof was upon the appellants, it was necessary for them to show in which of the two checks the $9,600 paid for 300 shares of Interborough Preferred was contained. They failed so to do. Furthermore, the intent of Miller & Co. in issuing the checks is clear. They undoubtedly intended that the $266,600 check should contain the proceeds of the appellants' stock, otherwise there would not be the striking similarity, that although for several hundred thousands of dollars, the check also contained a $600 item.

POINT VII.

The contention of the appellants that the check of $266,600 helped to pay off on August 24th loans aggregating $285,000, and that therefore they are entitled to share in the securities which were held as collateral for the other loans, is without merit. It is disposed of by the case of First National Bank of Princeton *vs.* Littlefield, 226 U. S., 110.

This contention of the appellants has, to an extent, been already answered in Point II hereof. It is also answered by the Circuit Court of Appeals in the latter part of their opinion (p. 88). It is based upon the assumption that the check of $266,600 was used towards paying the two loans aggregating $285,000 which were paid by the bankrupt on the 24th. However, there is no proof in the record that the check was so used, or that the loans were not paid off prior to the deposit of this check. Furthermore, whatever securities were held by the bank as collateral for these loans were returned to the bankrupts and not shown to have come into the

hands of the receiver. The collateral which was held by the bank at the time of the suspension was not shown to have been obtained in any way by the use of the check of $266,600.

The fact that the trustee, subsequently to the liquidation of the loan, received from the bank a balance representing the equity does not affect the situation, for this equity did not represent any part of the appellants' money.

The appellants have argued what the situation would have been if the two loans aggregating $285,000 had not been paid on the 24th. However, it is useless to speculate, for the fact is the loans were paid and the funds used in payment were not shown to have been the appellants'.

The position of the appellants is exactly the same as that of the First National Bank of Princeton, whose trust funds were also on deposit with the Hanover National Bank on the 24th.

If the contention made by the appellants herein were correct, the bank should have recovered for the same reasons. However, the Circuit Court of Appeals decided in both the case at bar and in the First National Bank of Princeton case that the claimants had no lien or right in the securities constituting collateral for the various loans, and the Circuit Court of Appeals was sustained in the case of the First National Bank of Princeton *vs.* Littlefield by this Court.

There is no reason why this Court should now reverse itself.

POINT VIII.

The cases abstracted in the appendix to appellants' brief do not conflict with the position taken by the appellee on this appeal.

It is undoubtedly the law that if trust moneys or property are mingled with other moneys or prop-

erty by a trustee, they may be followed by *cestui que trust*, so long as the fund into which they go is not dissipated. This is true even if the trust money or property loses its identity by reason of the mingling provided the fund into which it went is still in existence.

This rule is basis of the decision in the case of *First National Bank of Princeton* vs. *Littlefield* (*supra*), and of the cases abstracted in appellants' brief.

If trust money is wrongfully placed by the trustee in his general bank account and mingled with other moneys of the trustee, the claimant may still follow them so long as he can show a balance remained continuously in the account from the time of the deposit equal to the amount claimed but if the account is entirely depleted as was the bankrupts' account in the case at bar by the certification of the Coombs checks, the trust moneys become dissipated and no longer traceable.

In the cases of *Smith* vs. *Mottley*, 150 Fed., 266, *In re Marsh*. 116 Fed., 396, *In re Royea's Estate*, 14 Fed., 182, *In re Hallett's Estate—Knatchbull* vs *Hallett*, L. R. 3 Ch. Div., 196, and *In re Stewart*, 178 Fed., 463, cited by appellants, it was held that a recovery can only be had where the claimant proves that the bank account into which his moneys went was never exhausted, but that the balance always continued in excess of the amount claimed.

In the said case of *In re Hallett's Estate—Knatchbull* vs. *Hallett, supra*, the Master of the Rolls said, on page 719:

> "The guiding principle is, that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether there remains nothing to be subject to the trust."

The other cases cited do not deal with money deposited in a bank account but apply the same principles to other property and funds.

The case of *Gorman* vs. *Littlefield*, 229 U. S., 19, involves a somewhat different question than the case at bar. In that case the claimant's stock had been deposited by the bankrupt. Stock of the same kind came into the hands of the trustee. No other claimant claimed said stock. Clearly it belonged to the claimant.

The question in the case at bar is more one of fact, than only of the law. This Court having decided in the case of the *First National Bank* vs. *Littlefield*, that the certification of the Coomb's checks completely depleted the bankrupt's account in the Hanover National Bank, the only question is, did the appellants prove that their money went into such account after its depletion. We respectfully submit that we have shown herein that they failed to furnish such proof and that, as a matter of fact, their money went into account prior thereto.

POINT IX.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

DANIEL P. HAYS,
Solicitor for Appellee,
115 Broadway,
Manhattan,
New York City.

DANIEL P. HAYS,
RALPH WOLF,
EDWIN D. HAYS,
Of Counsel.

SCHUYLER *v.* LITTLEFIELD, TRUSTEE OF BROWN & CO.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 213. Argued January 29, 1914.—Decided March 23, 1914.

Where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted, the trust fund is thereby dissipated and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account.

One seeking to charge a fund in the hands of a trustee for the benefit of all creditors as being the proceeds of his property and therefore a special trust fund for him, has the burden of proof; and if he is un-

able to identify the fund as representing the proceeds of his property, his claim must fail as all doubt must be resolved in favor of the trustee who represents all creditors.

193 Fed. Rep. 24, affirmed.

THE facts, which involve determining the relative rights to the bank balance of a bankrupt stockbroker, of the trustee and of a customer whose securities the bankrupt had sold, are stated in the opinion.

Mr. W. Benton Crisp, with whom *Mr. Theodore M. Crisp* was on the brief, for appellants:

The bankrupts wrongfully and fraudulently converted the property of the appellants. This was found by both courts below.

The bankrupts commingled the proceeds of appellants' property with that of their own, and the combined or commingled funds having been traced into the Hanover National Bank funds, a part of which are now in the hands of the trustee, so long as any portion of said funds remained, the appellants are entitled to have their money paid out of them and if said funds were used to release collateral in the bank, which collateral, or the proceeds of which collateral, went into the hands of the trustee, they should be impressed with a lien in favor of the appellants. *Gorman* v. *Littlefield*, 229 U. S. 19; *Peters* v. *Bain*, 133 U. S. 670; *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 229, 239; *In re Marsh*, 116 Fed. Rep. 396; *Erie Railroad Co.* v. *Dial*, 140 Fed. Rep. 689; *In re Royea*, 143 Fed. Rep. 182; *Smith* v. *Motley*, 150 Fed. Rep. 266; *Smith* v. *Township*, 150 Fed. Rep. 257; *In re Stewart*, 178 Fed. Rep. 463, 470; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Cavin* v. *Gleason*, 105 N. Y. 256; *Knatchbull* v. *Hallet*, L. R. 13 Ch. Div. 696.

All equities are in favor of the appellants. They have been fraudulently deprived of their property and if they are unable to obtain it in this proceeding, the general

creditors of the bankrupts will profit by the fraudulent acts of the latter. This is not in keeping with the policy of the Bankruptcy Law. *Hurley* v. *Atchison &c. Ry. Co.*, 213 U. S. 126, 134; *In re Chase*, 124 Fed. Rep. 753.

Mr. Edwin D. Hays, with whom *Mr. Daniel P. Hays* and *Mr. Ralph Wolf* were on the brief, for appellee:

The burden was on the appellants to show that their property, or the proceeds thereof, came into the hands of the trustee. *First National Bank* v. *Littlefield*, 226 U. S. 110; *In re McIntyre*, 181 Fed. Rep. 960; *American Can Co.* v. *Williams*, 178 Fed. Rep. 420; *Matter of Hicks*, 170 N. Y. 195.

All trust funds deposited by the bankrupts in the Hanover National Bank prior to the certification on August 25 of the check for $146,600 to Coombs & Co. were dissipated by the certification of said check, and no funds so deposited came into the hands of the receiver or trustee.

The cases in appellants' brief do not conflict with the position taken by the appellee on this appeal.

It is undoubtedly the law that if trust moneys or property are mingled with other moneys or property by a trustee, they may be followed by *cestui que trust*, so long as the fund into which they go is not dissipated. This is true even if the trust money or property loses its identity by reason of the mingling provided the fund into which it went is still in existence. *First National Bank* v. *Littlefield*, *supra*.

If trust money is wrongfully placed by the trustee in his general bank account and mingled with other moneys of the trustee, the claimant may still follow them so long as he can show a balance remained continuously in the account from the time of the deposit equal to the amount claimed, but if the account is entirely depleted as was the bankrupts' account in the case at bar by the certification of the Coombs checks, the trust moneys become dissipated and no longer traceable.

MR. JUSTICE LAMAR delivered the opinion of the court.

This record presents for determination another of the many questions arising out of the tangled and complicated affairs of Brown & Co., stockbrokers of New York City, who made an assignment on August 25, 1908, and who were subsequently adjudged bankrupts. The proceeding is by Schuyler, Chadwick & Burnham, to recover trust funds which they claim to have traced into the possession of Brown & Company's Trustee in bankruptcy. The case involves an application of the rule that where one has deposited trust funds in his individual bank account and the mingled fund is at any time wholly depleted the trust fund is thereby dissipated, and cannot be treated as reappearing in sums subsequently deposited to the credit of the same account. *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696; *Peters* v. *Bain*, 133 U. S. 671 (1), 693; *Board of Com'rs* v. *Strawn*, 157 Fed. Rep. 49, 54.

There is no controversy about the law, but a complete disagreement about matters of fact where it is necessary to decide with certainty, on the one hand, the exact time and order in which a series of checks were deposited; and, on the other, to determine, with equal certainty, the exact order in which a series of checks drawn on that account were paid and what use was made of the money so drawn. As the bankruptcy occurred on August 25, 1908, and as the testimony was taken several months later, it is not surprising that the witnesses were not able to establish definitely the order in which these transactions took place, nor that the Referee, District Judge and Court of Appeals each differed from the other as to what had been proved. The Referee found that Schuyler, Chadwick & Burnham had traced their funds into the hands of the Trustee and were therefore entitled to recover. The District Judge agreed with the Referee in this conclusion but disagreed with him as to some of the findings of fact

on which that conclusion was based. The Circuit Court of Appeals disagreed with both and held that the trust fund had not been traced into the hands of the Trustee and thereupon dismissed the complaint. The appeal from that decree involves a consideration of the facts, which may be thus briefly stated:

Brown & Co. were brokers in New York City, and on August 24th, 1908, by false representations of solvency obtained from Schuyler, Chadwick & Burnham, 300 shares of Interborough stock (worth $32 per share) agreeing at once to send in payment a check for $9,600, capable of certification. This was not done and in spite of repeated demands the check was not delivered until after banking hours on August 24th and too late to have it certified that day. In the meantime Brown & Co. sold to Miller the

300 shares Interborough, for	$ 9,600
1000 shares Northern Pacific	143,000
1000 shares Great Northern	137,000
Total	$289,600

Miller thereupon gave Brown & Co. a check for $266,600, which was deposited in the Hanover National Bank on August 24. Miller retained the balance of $23,000 on some claim which was not admitted by Brown & Co. They later that day obtained from Miller a check for $23,000, which was deposited in the bank the next morning, but after the Bank had refused to pay or certify the Schuyler, Chadwick & Burnham check for $9,600.

It thus appeared that the stock fraudulently obtained by Brown & Co. had been sold by them, with other stock, to Miller who paid for the whole in two checks—one for $266,600 deposited to Brown & Co.'s account in the Hanover National Bank on August 24th, and another for $23,000 deposited in the same bank on August 25th.

1. If the trust fund of $9,600 was included in the check

for $266,600, then it was dissipated except to the extent of $6,180.17, which was the sum left to Brown & Co.'s credit at the close of business on August 24th. And inasmuch as all of that balance was paid out early the next day, the trust fund was thereby wholly dissipated so far as the bank account was concerned.

If, however, the trust fund of $9,600 is to be treated as having been included in Miller's check for $23,000, then a similar result follows, though on this point the evidence of the witnesses and the findings of the two courts are in conflict. The controlling question was whether the $23,000 had been deposited before or after the payment of a check for $146,000 which absorbed the whole amount then in bank. We see no reason to disturb the finding of the Circuit Court of Appeals that the check for $23,000 was deposited soon after the Bank opened on August 25th, and that it, with other money deposited during the morning, was used at about 11.30 A. M. to pay this check for $146,000 given by Brown & Co. to Coombs & Co. The payment of this large sum depleted the account and dissipated the trust fund in bank.

2. The appellants, however, presented their case in a double aspect. They contended that even if the trust fund of $9,600 was checked out of the bank they are able to trace the fund into stocks that subsequently came into the hands of the Trustee in Bankruptcy. This was based on the claim that out of the proceeds of the Miller checks, Brown & Co. had paid notes due to the bank and thereby released collateral which ultimately came into the possession of the Trustee.

But the record fails to show when the $266,600 was deposited and it also fails to show with the requisite certainty the particular use made by Brown & Co. of that money. The banking transactions on August 24th involved several millions of dollars. Money was deposited by Brown & Co. in the bank and money was borrowed by

Brown & Co. from the bank. Part of the loans were deposited to their bank account and a part, represented by cashier's checks, did not appear in that account. Money was paid by Brown & Co. to outsiders and to the bank. Payments to the bank were made on accounts of notes, some of which represented loans appearing in the deposit account, and others represented loans which had not been so entered. Some of the loans were secured and others were unsecured, and whether the money received from Miller (which included the trust fund of $9,600), was used to pay the secured or unsecured loans does not appear with certainty.

It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the Court of Appeals (193 Fed. Rep. 24–33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank and thence into collateral which ultimately came into the hands of the Trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600 said to have been traced into stock in the possession of the Trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the Trustee, who represents all of the creditors of Brown & Co., some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund.

The decree is affirmed.